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95-1732

No. _____

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI and APPENDIX Volume I

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QUESTIONS PRESENTED

1. Does the Clean Water Act authorize federal jurisdiction for citizen suits to enforce State water quality conditions of an NPDES permit when those conditions are not translated into specific discharge limitations?

2. Is an NPDES permittee shielded from a Clean Water Act citizen suit for violations of State water quality standards in a receiving water for discharges that are authorized under its permit?

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CITY OF PORTLAND,

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NORTHWEST ENVIRONMENTAL ADVOCATES,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The City of Portland, Oregon, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's Opinion in the case of *Northwest Environmental Advocates v. City of Portland,* No. 92-35044.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit of which review is sought is reported at 56 F. 3d 979 (1995). The Opinion is reproduced in the Appendix at App-34. A previous Opinion, withdrawn upon a petition for rehearing, was reported at 11 F. 3d 900 (1993), and is reprinted at App-1. The Order denying rehearing, with dissent, appears at 74 F.2d 945 (1996), and is reproduced at App-69 The District Court Opinion reversed by the Ninth Circuit is found at App-77.

JURISDICTION

The judgment of the Ninth Circuit is dated January 24, 1996. This Court has jurisdiction to review the Opinion below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the Clean Water Act, 33 U.S.C. §§ 1251 - 1376. The relevant provisions are set out in the appendix.

STATEMENT OF THE CASE

A. The Facts

1. The City's Sewer System

When Petitioner City of Portland's sewer system was first constructed, beginning in the early 1860's, the sewers were "combined" to carry both sanitary wastes and

storm runoff. These early sewers discharged directly into the nearby Willamette River and Columbia Slough. In 1947, the City began to build massive interceptors at the end of the sewer lines to capture the sewage before it entered the water and pipe it to a sewage treatment plant.

However, neither the interceptors nor the sewage treatment plant has unlimited capacity. The interceptors were built to handle three times the average dry weather flow. During times of high rainfall, the capacities of both the interceptors and the treatment plant are exceeded. The pipes that transport waste directly to the Willamette River and Columbia Slough remain in place as a safety valve for the system. Instead of backing up in basements and streets, the excess flow is discharged directly into the River and Slough. Although the total amount of the discharge is large, it is approximately 90% storm water. The events during which these pipes discharge, and sometimes the pipes themselves, are called "combined sewer overflows" or CSOs.

Portland is just one of many communities throughout the country that rely upon combined sewer systems. The Environmental Protection Agency (EPA) estimated in 1989 that 1200 communities still employed CSOs.

The City's sewer system has operated under National Pollution Discharge Elimination System (NPDES) permit since the advent of that permit process. Its permits were issued by the State of Oregon Department of Environmental Quality and approved by the EPA. The City's 1984 NPDES permit, at issue here, included, as

permitted discharges, the CSOs that discharge into the Willamette River and Columbia Slough.[1]

The permit contained effluent limitations for discharges from two outfalls from the City's treatment facility. It went on to state:

> The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure [CSO]. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).

The permit also contained the following language:

> Notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR [Oregon Administrative Rules] 340-41-445 except in the following defined mixing zone: The mixing zone shall consist of a 100 foot radius from the point of discharge.

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[1] Respondents challenged whether the CSOs were covered by the 1984 permit. Both decisions of the Ninth Circuit upheld the trial court's conclusion that the CSOs were covered by the City's permit.

It was only in 1989 that EPA declared, after years of approving NPDES permits for combined sewer systems such as Portland's, that CSOs would have to meet technology-based requirements of the Clean Water Act and applicable State water quality standards. EPA National CSO Control Strategy, 54 Fed. Reg. 37370, Sept. 8, 1989. Recognizing that such changes could not be achieved overnight, EPA also authorized the use of administrative enforcement orders to require compliance within the shortest reasonable time.[2] In 1991, the State Department of Environmental Quality and the City entered into a Stipulation and Final Order, under which the City agreed to replace the CSO system at a cost of between $500 million and $1.2 billion dollars.[3] Respondents participated in the extensive public process that led to the Stipulation and Final Order. The City has been moving forward rapidly to carry out the terms of the Stipulated Final Order.

Respondent NWEA gave notice of intent to sue on February 1, 1991, and on April 16, 1991, respondents filed this action under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. The District Court had jurisdiction under 28 U.S.C. § 1331.

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[2]In 1994, EPA published its final Combined Sewer Overflow (CSO) Control Policy, which addressed long-term implementation of controls for CSOs. 59 Fed. Reg.18688, April 19, 1994.

[3]The City's 1984 permit remained in effect during negotiations until the issuance of the new permit in 1991.

B. The District Court Decision

The District Court bifurcated the proceeding with the agreement of the parties. The first phase addressed two issues: 1) were the CSOs covered by the City's 1984 NPDES permit; and 2) could the respondents sue the City for water quality violations resulting from CSO discharges. Issues relating to the number of actual violations and any penalties were to be decided subsequently, if necessary. In January 1992, the District Court issued an opinion and judgment in favor of the City, ruling that the CSOs were permitted discharges under the City's 1984 NPDES permit and that violations of State water quality standards are actionable in citizen suits only if they are incorporated into an NPDES permit through effluent limitations.

C. The Court of Appeals Decisions

On December 10, 1993, the Ninth Circuit Court of Appeals issued its first Opinion in the case, affirming the District Court (*NWEA I*). App-1 The Court of Appeals, in an Opinion by Judge Ingram, held that the CSOs were permitted under the City's 1984 permit. It further held, after reviewing the statutory language, the legislative history, the relevant case law and the practical considerations facing permit holders, that "under 33 U.S.C. § 1365, water quality standards are unenforceable by way of a citizen suit unless they have been translated into end-of-pipe effluent limitations." Judge Pregerson dissented from only the holding on citizen suit jurisdiction.

Respondents filed a petition for rehearing/suggestion for rehearing *en banc*. Although the full court voted to

deny rehearing *en banc* on April 25, 1994, the panel did not issue the mandate within seven days as required by Federal Rule of Appellate Procedure 41(a). Instead, the panel resumed control of the case and on June 7, 1995, withdrew the first Opinion and issued a new Opinion (*NWEA II*). It affirmed the District Court's conclusion that the CSOs were permitted under the City's 1984 permit, but reversed the District Court on the question whether Congress provided jurisdiction for citizen suits to enforce water quality standards that are not translated into end-of-pipe limitations. The Court held that "NWEA has standing to enforce water quality standards contained in Portland's NPDES permit." App-60. *NWEA II* was written by Judge Pregerson, with a dissent on the issue of citizen suit jurisdiction from Judge Kleinfeld.

The City then filed a petition for rehearing/ suggestion for rehearing *en banc*. Rehearing was denied by the panel and a vote on suggestion for rehearing *en banc* failed to receive a majority of votes. However, Judge O'Scannlain filed a dissent, in which he was joined by Circuit Judges Hall, T.G. Nelson and Kleinfeld. App-70.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS REGARDING THE SCOPE OF FEDERAL COURT JURISDICTION GRANTED FOR CITIZEN SUITS IN THE CLEAN WATER ACT AND THE SHIELD PROTECTION PROVIDED BY AN NPDES PERMIT

The decision in *NWEA II*, in the words of Judge O'Scannlain, "contradicts the plain language of the Clean Water Act, conflicts with a prior decision of [the Ninth] [C]ircuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue." App-76. It provides another "novel application of federal statutory law," *See Meghrig v. KFC Western, Inc.*, 64 U.S.L.W. 4135, (U.S. March 19, 1996)(No. 95-83), and conflicts with other circuit court decisions.

The Ninth Circuit has wrongly interpreted the scope of citizen enforcement authorized in the Clean Water Act and has allowed an inappropriate expansion of federal court jurisdiction. On the basis of *NWEA II*, State permit writers can create federal jurisdiction not granted by Congress by inserting conditions in NPDES permits. The decision in *NWEA II* has blurred the Clean Water Act distinction between effluent limitations (33 U.S.C. § 1311) and water quality standards (33 U.S.C. § 1313) and requires federal courts, rather than federal and state regulators, to interpret and enforce water quality standards against individual permit holders. In addition, in contravention of the "permit as a shield" provision of 33 U.S.C. §1342(k), it has authorized a citizen suit against the City of Portland,

even though it ruled that the City's CSOs were permitted discharges under the City's NPDES permit, thereby abrogating the permit as a shield protection of the Act.

A. The Statutory Scheme Differentiates Effluent Limitations and Water Quality Standards

The Clean Water Act establishes a system for EPA or delegated States to issue NPDES permits with conditions that allow the discharge of pollutants, 33 U.S.C. § 1342. The statute establishes two levels of control. It is designed to implement and enforce water quality standards which id does by imposing only effluent limitations in permits, not through generic standards themselves.

In developing the permits for individual dischargers, the EPA or the States establish for each discharger effluent limitations, which "restrict the quantities, rates, and concentrations of specific substances which are discharged . . .." *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239, 251(1992). Effluent limitations include "those necessary to meet water quality standards." 33 U.S.C. §1311. Water quality standards, on the other hand, do not govern the actions of dischargers directly. Water quality standards "establish the desired condition of a . . . waterway." *Arkansas v. Oklahoma, supra,* 117 L.Ed.2d at 251. Water quality standards

> serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based

> treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

40 C.F.R. § 131.2.

If the effluent limitations established in the various NPDES permits issued to those discharging into a particular water body are not sufficiently stringent to implement the water quality standards established for that body, the statute requires the State to identify and prioritize those waters. The State then must establish maximum discharge levels for specified pollutants that are calculated to implement applicable water quality standards. 33 U.S.C. § 1311(d).

This differentiation between effluent limitations and water quality standards is carried through to the citizen suit provision of the Clean Water Act, which authorizes citizens to enforce an "effluent standard or limitation" and defines that term to include "a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter . . .." 33 U.S.C. § 1365. Respondents claimed that because the City's NPDES permit contained a general reference to water quality standards, all of the State water quality standard regulations became enforceable by citizens in federal court, even though they were not translated into effluent limitations in the City's permit.

B. Citizen Suit Enforcement of Water Quality Standards Is an Unwarranted Expansion of Federal Court Jurisdiction

The decision in *NWEA I* notes that every court that has addressed the issue has held that the citizen suit provision does not authorize direct suits to enforce water quality standards.[4] The *NWEA II* majority concluded that even if the citizen suit provision does not include direct authorization to enforce water quality standards, a general reference to water quality standards in an NPDES permit gives federal courts jurisdiction to enforce those State regulations. This conclusion, however, confuses the fundamental nature of effluent limitations and water quality standards and conflicts with the Second Circuit's decision in *Atlantic States Legal Foundation Inc. v. Eastman Kodak* Co., 12 F.3d 353 (2d Cir. 1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 62, 130 L.Ed. 2d 19 (1994), regarding the scope of federal citizen suit jurisdiction under the Clean Water Act.

Moreover, it is contrary to established federal law to say that the State permit writer can create federal court jurisdiction where Congress has declined to do so. *See*

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[4]*NWEA I* cites the following cases, in addition to *Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842 (9th Cir. 1987), for having rejected the proposition that the Act gives citizens have standing to enforce water quality standards: *New York State v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988).

Bender v. Williamsport Area School Dist., 475 U.S. 534, 546, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (federal courts have only the jurisdiction given by the Constitution and federal statute); *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) (agreement of the parties cannot confer jurisdiction on federal courts).

The facts in the *Kodak* case are closely analogous to those presented here. There, Kodak's permit established effluent limitations for specific pollutants. The plaintiff's citizen suit alleged violations of Sections 301 (33 U.S.C. §1311) and 402 (33 U.S.C. § 1342) of the Clean Water Act based on the discharge of other pollutants not listed in Kodak's permit. The plaintiff relied on a permit provision that stated:

> [T]he discharge of any pollutant not identified and authorized or the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

12 F.3d at 359.

The Court in *Atlantic States v. Kodak* makes the jurisdictional point ignored by the Ninth Circuit in *NWEA II* - that the scope of federal jurisdiction may not be expanded by the actions of State permit issuers. The Second Circuit held that, although they could be enforced by the States or the EPA,

> "state regulations, including provisions of SPDES [State Pollutant Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required, by federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365."

Id.

In support of that conclusion, the Second Circuit cited the EPA regulations, which state that nothing in the agency's procedures for approving, revising and withdrawing State programs precludes a State from:

> (2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

40 C.F.R. § 123.1(i)(2).

NWEA II also conflicts with an earlier Second Circuit decision in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), regarding the scope of jurisdiction created in § 505, 33 U.S.C.

§ 1365.[5] In that case, four environmental organizations attempted to intervene in an action brought by the United States against the defendant, in part to prevent "an imminent and substantial endangerment to the health of persons or to the welfare of persons," 33 U.S.C. § 1364, under the Clean Water Act. The Court of Appeals determined that citizens could intervene if they could have initiated the action under the citizen suit provision. It concluded, however, that § 1365 did not authorize such suit.

The court relied upon analysis similar to that employed by the Ninth Circuit in *NWEA I*, but abandoned in *NWEA II*. In particular, the Second Circuit's review of the legislative history of the citizen suit provision and the 1972 amendments to the Clean Water Act led it to conclude that the citizen suit provision does not authorize suits where courts would be required to "make technical evaluations relating to pollutants for which no effluent levels have been established." 749 F. 2d at 980.

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[5]Both of the Second Circuit decisions may have drawn upon that Court's clear and forceful analysis of the distinction between effluent limitations and water quality standards in *Bethlehem Steel v. Environmental Protection Agency*, 538 F. 2d 513, 515 (2d Cir. 1976)

> ("[A]lthough water quality standards and effluent limitations are related . . . the two are entirely different concepts and the difference is at the heart of the 1972 amendments [to the Clean Water Act.]").

Although it arises in quite a different context, the analysis of the Court of Appeals for the District of Columbia Circuit in *American Paper Institute, Inc. v. Environmental Protection Agency*, 996 F. 2d 346 (D.C. Cir. 1993), also differs significantly from the analysis in *NWEA II* regarding the relationship between effluent limitations and water quality standards. In that case, the plaintiff challenged the regulations adopted by EPA requiring writers of pollution discharge permits to use one of three methods to interpret State water quality standards containing narrative criteria so as to "create precise chemical-specific effluent limitations in those permits." 996 F. 2d at 348.

The court concluded that:

> The regulation thus seems to provide an eminently reasonable means of effectuating the intent of the previously adopted narrative criteria as well as *Congress' own intent*, made explicit in section 301 of the CWA, *that all state water quality standards be enforced through meaningful limitations in individual NPDES permits*. (Emphasis added).

Id.

Both the EPA regulation and the Court's analysis recognize that the intent of the Clean Water Act is to enforce water quality standards in citizen suits only through the effluent limitations established in each permit - not

through the wholesale incorporation of "generic standards" relating to water quality.

Finally, *NWEA II* conflicts with the Ninth Circuit's own decision in *Oregon Natural Resources Council v. United States Forest Service, supra*. In that case, the citizen suit plaintiffs claimed that road building and timber harvesting activities to be conducted on a timber sale would violate water quality standards. Although there was no point source discharge involved, the plaintiffs claimed that § 1311(b)(1)(C) incorporates water quality standards established under § 1313 and is not limited to point sources. There the Ninth Circuit stated:

> [E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards.

834 F.2d at 850. It held that the "limitations" referred to in § 1311(b)(1)(C) are effluent limitations and are applicable only to point source discharges. The Court concluded that the plaintiffs did not have a cause of action under the citizen suit provision. *Id*. Although the context is different, the analysis of the role of water quality standards in *NWEA II* conflicts with the analysis in *Oregon Natural Resources Council*.

In sum, the *NWEA II* majority interpretation of the Clean Water Act conflicts with the language of the statute and the interpretation of other Circuit Courts of Appeals, and authorizes an unwarranted expansion of federal court jurisdiction.

C. The Decision in *NWEA II* Abrogates the Permit as a Shield Doctrine

Under the *NWEA II* ruling, permit holders such as the City can no longer rely on the effluent limitations defined by the regulatory body in their NPDES permits. It puts each such permit holder at risk of citizens suits if the entire water body fails to meet water quality standards. As *NWEA I* pointed out:

> Under a water quality based enforcement scheme such as the pre-1972 Act, dischargers faced problems in planning and regulating the legality of their actions because this legality is dependent on natural conditions such as the weather and third parties' discharges. . . . As a practical matter, NWEA's interpretation of § 1365 places dischargers such as the City in the same untenable pre-1972 position. No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act. Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for

> the future with the assurance that if they remain within concrete permit parameters, they will remain on the correct side of the law.

App-25.

The opinion in *NWEA II* also directly conflicts with the *Kodak* Court's interpretation of the permit as a shield provision of the Clean Water Act. The court in *Kodak* noted that "the EPA's actions and policy statements have frequently contemplated discharges of pollutants not listed under an NPDES or SPDES permit." 12 F.3d at 357-58. One such policy is the "permit as a shield" policy adopted by EPA under § 402(k), 33 U.S.C. § 1342(k). Under that statute, compliance with an NPDES permit is deemed to be compliance with specified provisions of the Clean Water Act for purposes of enforcement, including enforcement by citizens. An EPA policy memorandum regarding the permit as a shield provision states:

> [A] permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:
>
> * * * *
>
> 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically

> identified as present in facility discharges during the permit applications process[.]

Environmental Protection Agency, "Memorandum: Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits," July 1, 1994, App-175-76.

The Second Circuit relied in part on this Court's explanation of § 402(k) in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n. 28, 97 S.Ct. 965, 51 L.Ed.2d 204, 223 n. 28 (1977).

> "The purpose of § 402(k) seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality."

However, under the Ninth Circuit's ruling in *NWEA II*, the City will have not finality because:

> No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act.

NWEA I, App-25. The Ninth Circuit's decision in *NWEA II* destroys that permit as a shield protection. That decision, like the contentions of the plaintiff in the *Kodak*

case, "stands [the regulatory framework of the Clean Water Act] on its head." 12 F.3d at 357.

II. AN IMPORTANT QUESTION OF FEDERAL LAW HAS BEEN WRONGLY DECIDED BY MISAPPLICATION OF A DECISION OF THIS COURT

The Ninth Circuit panel in this case based its reversal of *NWEA I* on this Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994), even though that case, as Judge Kleinfeld noted in his dissent, "does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits." App-62 *NWEA II* uses *Jefferson County* to muddle the distinction between effluent limitations and water quality standards that was carefully established by the Clean Water Act - a distinction that this Court has always recognized.

The issue in *Jefferson County* was whether the State environmental agency properly conditioned a § 401 (33 U.S.C. §1341) permit for a hydroelectric project on requirements of State law that did not relate to the quality of the discharge from the facility, but rather on the maintenance of stream flow. This Court ruled that § 401 allowed the State to do so, based on the language of that section.

NWEA II mischaracterizes the issues and this Court's analysis in *Jefferson County*. By relying on selected words and phrases from the opinion, it concludes

that "The county's losing argument in *Jefferson County* is very similar to the argument advanced by Portland in the instant case." App-55. However, the county's contention that the State may not rely upon "designated uses" but only upon water quality "criteria" in imposing limitations for a permit has no relation to the City's contentions in this case. The instant case does not challenge the authority of the State to impose specific limitations translated from water quality standards to a specific permit, as was done in *Jefferson County*. It poses the very different question whether water quality standards that have not been translated into specific effluent limitations in an NPDES permit may be enforced by a citizen suit in federal court. The ability of States to impose conditions under § 401 holds a significantly different position in the statutory scheme than the ability of citizens to enforce water quality standards through an NPDES permit.

Section 401 requires that States provide a water quality certification before a federal license or permit may be issued for activities that may result in discharge to navigable waters. In that process, the State's function is not unlike its function as the writer of an NPDES permit - it must set forth specific requirements for the proposed activities, based on water quality standards and other requirements. In *Jefferson County*, the State did so - it required a minimum stream flow of between 100 and 200 cfs, depending on the season. 128 L.Ed.2d at 726.

This Court recognized throughout *Jefferson County* that it is the specific translation of water quality standards by the State agency that is required and that will be enforced:

> Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the River as a fishery, must be translated into specific limitations for individual projects.

Id. at *730. Cf. Arkansas v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 1046, 117 L.Ed 2d 239, 251 (1992) (articulating the distinction between effluent limitations and water quality standards); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 202-205, 96 S.Ct. 2022, 48 L.Ed. 2d 578 (1976) (water quality standards were retained as the ultimate goal of pollution control, but enforcement would be handled at the "end of the pipe.") The Ninth Circuit decision in *NWEA II* ignores that distinction.

The Ninth Circuit's misapplication of *Jefferson County* is dramatic. On the basis of this Court's holding that under §*401 States* may impose *specific limitations* for individual projects based on State water quality standards, the Ninth Circuit panel reversed itself to hold that under §*505 citizens* may enforce water quality standards that have *not been translated* into specific limitations for an NPDES permit.

This misapplication of *Jefferson County* distorts the statutory scheme enacted in the Clean Water Act. For permit holders, such as the City of Portland, it takes away the certainty the Act intended to provide. It puts federal courts in the business of interpreting and applying water quality standards - the position the Clean Water Act

reserved for the state and federal regulators. Moreover, it violates the principle that federal court jurisdiction may only be created by the constitution or by Congress.

CONCLUSION

For the foregoing reasons, the City's petition for certiorari should be granted.

Respectfully submitted,

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April 23, 1996

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Northwest Environmental Advocates)		
A Non-Profit Oregon Corporation)		No. 92-35044
and Nina Bell,)		
Plaintiffs-Appellants,)		D.C. No.
v.)		CV-91-339-PA
City of Portland,)		
Defendant-Appellee.)		OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding
Argued and Submitted
May 6, 1993- Portland, Oregon

Filed December 10, 1993

Before: Harry Pregerson, Andrew J. Kleinfeld, Circuit Judges, and William Ingram, District Judge

Opinion by Judge Ingram; Partial Concurrence and Partial Dissent by Judge Pregerson

INGRAM, District Judge:

Northwest Environmental Advocates and Nina Bell (NWEA) appeal from the district court's judgment in favor of Portland on their claims that the City is violating the Clean Water Act (CWA).

On April 16, 1991, NWEA filed suit in the district court

alleging that Portland's practice of discharging raw sewage during times of precipitation from 54 outfall points was not covered by a permit and that the practice had caused and was continuing to cause violations of Oregon's water quality standards. After a trial on the written record, the district court held that 1) the contested discharge points were covered by Portland's pollution permit, and 2) the court lacked jurisdiction to consider NWEA's water quality violation claims. We AFFIRM both holdings.

I. BACKGROUND

A. THE PORTLAND SEWAGE TREATMENT SYSTEM

At issue is the operation of the Portland sewer system. Portland operates a sewage treatment system that includes a network of combined sewage and stormwater pipes. Although the construction of these combined sewer pipes was discontinued in 1962, approximately 70% of the City's sewers remain combined sewers. Supp. E.R. 21. The effluent flowing in the system ideally is intercepted and transported to the Columbia Boulevard Treatment Plant where it is treated and then discharged into the Columbia River through two outfalls (Nos. 001 and 002). The interceptors can carry only "'three times [the] average dry weather flow'" of effluent to the treatment plant. Sunnarborg Aff., Supp. E.R. 21. When the flow exceeds the plant's capacity, as can occur during periods of precipitation, the effluent is released untreated through a system of combined sewer overflow (CSO) outfalls in what is termed a CSO event. There are between 50 and 80 CSO events every year in Portland. E.R. 216; *see also* Bureau of Environmental Services, City of Portland, *Columbia*

Slough Planning Study Background Report (1989) (there are between 67 and 79 CSO events per year in the Columbia Slough).

Portland has 54 CSO outfalls; 12 drain into the Columbia Slough and 42 drain into the Willamette River. These waterways and their environs are used by Portland residents for recreation, including water contact activities such as boating. The release of untreated sewage into such public waters can present health risks. *See* National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37370, 37371 (1989) ("CSOs have been shown to have severe adverse impacts on human health under certain conditions."). Appellants have supplied both anecdotal and scientific evidence of the polluted nature of the Willamette River and the Columbia Slough, especially during and immediately after CSO events. *See, e.g.*, Portland's Response to NWEA's Interrogatories, E.R. 119; Thutt Aff., E.R. 159-178; Pratt Aff., E.R. 20.

Abatement of CSO events is not easy. It has been estimated that to solve the problem in Portland alone will cost between $500 million and $1.2 billion dollars. E.R. 221. Estimates for the entire nation are between $70 billion and $109 billion dollars. *Environmental Groups Call for Effort to Deal with Combined Sewer Problems,* 23 Env. Rptr. (BNA) 13 (1992) (upgrades could start at between $70 and $80 billion dollars); *Combined Sewer Overflow Problems Demand New Approach, Local Officials Say,* 20 Env. Rptr. (BNA) 1939 (1990) (costs could be as high as $109 billion).

B. PROCEEDINGS IN THE DISTRICT COURT

On February 1, 1991 NWEA gave written notice to Portland, the EPA Administrator, the State of Oregon, and the EPA Regional Administrator of its intent to file suit in the district court challenging the legality of the CSO discharges. Complaint, E.R. 9. In April 1991, after the required 60 day notice period, NWEA filed this action.

The crux of the NWEA complaint was that the 54 CSO outfalls being used regularly by the City were not covered by the City's 1984 National Pollution Discharge Elimination System (NPDES) permit. Because unpermitted discharges of pollutants are illegal, NWEA argued the City was violating the CWA. Even if the CSOs were covered by the permit, NWEA argued that the discharges violated Oregon water quality standards and therefore violated a condition of the Permit. These violations were ongoing and likely to continue. NWEA prayed for injunctive relief and civil penalties. Complaint, E.R. 10-11.

The 1984 permit was to expire in July 1989. However it remained in effect until Portland and the Oregon Department of Environmental Quality (DEQ)[1] were able to complete the renewal process and agree on the terms of a new permit. DEQ forwarded a draft of a proposed renewal permit to Portland in December 1990. This draft permit required the City to "meet water quality standards at all discharge points, including CSOs,. . ." Appellee's Brief at

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[1]National Pollution Elimination Discharge Permits in Oregon are issued by DEQ.

11. Because Portland could not meet the five year time table set forth in the proposed renewal permit, *id.*, the parties determined that a compliance order separate from the renewal permit, and requiring eventual abatement of all CSO events, was appropriate. After a period of Notice and Comment, Portland and the DEQ came to an agreement in August 1991. Under that settlement, Portland's new permit specifically listed the CSOs as permitted discharge points. In addition to the permit, the parties entered into a stipulation and final order (SFO) in which Portland agreed to replace the CSO system within the next 20 years.

Once these negotiations had been completed, Portland filed a motion to dismiss and the parties filed cross-motions for summary judgment. The court bifurcated the proceedings; first it would address whether Portland could be held liable for violations of the CWA, and then if necessary, determine whether violations had occurred and impose any necessary penalties. The parties stipulated to a trial of the liability phase on the summary judgment submissions, allowing the court to decide questions of fact as well as questions of law. Amended Opinion, E.R. 73.

After reviewing the submissions the district court issued an opinion and judgment. It later filed an amended opinion which was essentially the same as the original. The court found that Portland's 54 CSOs were covered by the 1984 NPDES permit, and thus that the City was not in violation of the Act for allowing unpermitted discharges. It also rejected NWEA's claim that Portland would nonetheless be liable for violating Oregon's water quality standards because the CWA did not confer federal jurisdiction to entertain citizen suits to enforce state water quality

standards.

II. ANALYSIS

A. DOES THE 1984 PERMIT COVER THE CSOs?

In the court below, NWEA argued that Portland had violated and continued to violate the CWA by discharging through unpermitted outfalls. The district court found otherwise, holding that the relevant NPDES discharge permit authorized CSO events under specific circumstances. NWEA asserts that the district court erred in so interpreting the permit.

We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other legal document. When reviewing a district court's interpretation of such a writing, the court reviews *de novo* the determination of whether it is ambiguous. *In re U.S. Fin. Sec. Litig.*, 729 F.2d 628, 632 (9th Cir. 1984). Interpretation of an unambiguous writing is also a question of law subject to *de novo* review. *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin. Inc.*, 688 F.2d 1228, 1230 (9th Cir. 1982). If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error. *U.S. Fin. Sec.*, 729 F.2d at 632; *Culinary & Service Employees Union*, 688 F.2d at 1230; *In re Agricultural Research & Technology Group, Inc.*, 916 F.2d 528, 537 (9th Cir. 1990).

NWEA argued in the court below that the 1984 permit covered only two point sources, outfalls 001 and 002 from the

treatment plant.[2]

The 1984 permit expressly "covers" only two point sources, outfalls 001 and 002 from the treatment plant. These outfalls are listed on the first page of the permit as the "SOURCES COVERED BY THIS PERMIT." E.R. 222. The 54 CSOs are not listed in this section. The first page of the permit also states that the receiving waterway for these discharges is the Columbia River. The Willamette River and the Columbia Slough are not mentioned.

Immediately below the section listing "SOURCES COVERED," the permit provides a description of the activities that are covered by the permit. This section, "PERMITTED ACTIVITIES," states that Portland is authorized to "operate a waste water collection, treatment, control and disposal system and discharge to public waters adequately treated waste waters only from the authorized discharge point *or points established in Schedule A . . . .*" E.R. 222 (emphasis added). Schedule A provides the effluent limitations for outfalls 001 and 002. More importantly, however, it provides that:

The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water

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[2]Effluent from outfalls 001 and 002 has been treated before it is discharged into the Columbia River.

recreation season (June 1 to October 31).[3] E.R. 223. Thus, on the face of the permit it appears that CSO events were considered to be a "permitted activity." Finally, Schedule C provides that the City must "continue to work toward the separation of sanitary sewage and storm water in presently developed areas in which this method is cost effective." E.R. 224.

NWEA contends that the court should only heed the first portion of the permit listing covered sources.[4] Because the CSOs are not specifically listed on page one as permitted sources, NWEA argues, they must not have been encompassed by the permit and are therefore illegal. To follow this reasoning would require the court to read the references to diversion structures out of the permit

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[3]The parties do not dispute that "diversion structure" refers to the CSOS.

In earlier permits, the 54 CSOs were listed in this provision of the permit. *See* Supp. E.R. 13 (1979) permit, "Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow."); Supp. E.R. 2 (1974 permit - same).

[4]NWEA attempts to downplay the importance and placement of the references to diversion structures, implying that they are somehow a part of the fine print. In reality however, the limitations on the frequency of CSO events appears in normal sized type on page two of the permit, directly below the effluent limits for discharges from outfalls 001 and 002. *See,* E.R. 223

altogether. The limitations on the frequency of CSO events and the requirement that Portland work towards upgrading its sewer system would then constitute mere surplusage.

The 1984 permit is clear on its face in permitting CSO events under specified conditions. The description of permitted activities specifically allows Portland to operate a sewage system and to discharge through two separate sets of discharge points, those listed on page one as authorized discharge points, and those described and listed in Schedule A.

The extrinsic evidence presented to the district court only strengthens this conclusion. The parties each offered evidence, in the form of affidavits and other documentary evidence, to support their respective understandings of the 1984 permit. NWEA relied mainly on four documents to support the position that the CSOs were not, and had never been, permitted. The first was a letter from W.C. Gaffi, Portland's Chief Engineer, to DEQ in 1988. Gaffi stated that "[t]he City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so." E.R. 278. The second document was an October 1990 memorandum from two members of the Portland Bureau of Environmental Services. In this memo, Linda MacPherson and Dave Kliewer indicated the need to set up a "discussion to determine if the CSOs are going to be permitted or not?" E.R. 279. The third is an undated memorandum in which a DEQ employee wrote that "[t]he potential exists for permitting both the storm and combined sewer discharges" E.R. 191.

NWEA argues that these three documents imply that the CSOs were not covered under the 1984 permit, because if they were, there would be no need to address including them in future permits.

Finally, NWEA offered a DEQ policy statement entitled "Strategy for Regulating Combined Sewer Overflows."[5] The report states that "[n]one of these outfalls [the CSOs] are covered by a permit, however, all are proposed to be addressed in the Portland-Columbia Blvd STP permit renewal." E.R. 208.

NWEA argues that this statement proves that DEQ had not permitted the CSOs in the 1984 permit. Portland, however, offered an affidavit by the author of the report to explain the statement. Barbara Burton explained that the quoted text did not mean that Portland's CSOs were not covered by an NPDES permit, and therefore were illegal. Instead, it was intended to convey that "none of the outfalls were individually *listed* with effluent limitations in Portland's 1984 NPDES permit. E.R. 281 (emphasis in original).

Barbara Burton's impression of the scope of the Portland NPDES permit was shared by Harold L Sawyer, formerly the Water Quality Division Administrator for DEQ. E.R. 282. Sawyer stated in his affidavit that "Portland's entire

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[5]This February 1991 document appears to have been prepared in response to the EPA's National Combined Sewer Overflow Control Strategy. *See* 54 Fed. Reg. 37370 (Sept. 8, 1989).

sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits." E.R. 283. According to Sawyer, DEQ knew, and always had known, that the Portland sewer system operated through a system of CSOs and treatment plants. *Id.* Moreover, "[i]f DEQ had considered combined sewer overflows to be outside of Portland's NPDES permit, as Water Quality Division Administrator for DEQ [he] would have proposed a specific program and schedule for treatment or elimination of such discharges for incorporation in the permit or in a separate compliance order." *Id.* These are the steps that DEQ took in 1991. Thus, "DEQ understood that Portland would continue to operate its combined sewer system as it had been operating the system prior to the existence of the NPDES permitting program, to prevent dry weather combined sewer overflows except during abnormal storm events." *Id.* at 285.

This position is repeated in the 1991 SFO. DEQ stated that "as a matter of policy the Department [DEQ] did not always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system . . . [Portland's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs." E.R. 260-61.

The district court, having reviewed these conflicting statements, found Portland's interpretation to be persuasive. The court recognized the import of the Gaffi letter, but determined that it was "not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permits and when

construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges." E.R. 83. The Sawyer and Burton affidavits were more persuasive because their explanations of the 1984 permit comported with the language of the permit itself. *Id.*

NWEA argues that, notwithstanding the extrinsic evidence, under the rules of contract interpretation the court must find that the CSOs were not covered by the 1984 permit. Courts should, if possible, interpret a contract so that its terms will not be illegal. *See Corbin, Contracts* § 546 at 169 (1960). This rule is advisory and should not be applied blindly to the detriment of the parties' intentions. "[A] specific provision in an otherwise valid contract should not be given a meaning that would have a legal effect that the court is convinced the parties did not intend, even though any alternative meaning will cause the provision to have no legal effect whatever." *Id.*

Under the regulations promulgated pursuant to § 1342 of the Clean Water Act, all NPDES permits should establish technology-based effluent limitations for all permitted point sources. 40 C.F.R. 122.44(a). Although technically the permit should have established effluent limitations for the CSOs, it appears that the parties intended to omit such requirements. The district court was presented with sufficient evidence from which it could determine that DEQ, as well as Portland, intended this allegedly unlawful interpretation. EPA approved the terms of the permit, including the absence of effluent limitations for the CSOs, even though the existence of the CSOs was clear on the permit's face. Moreover, prior to 1989, it appears that

many state permitting bodies believed that CSO outfalls could be permitted without being subjected to effluent limitations. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) (proposed regulations to "control effluents from combined systems which are not regulated under the sanitary system standards nor as discharges from separate storm sewer regulations"). *Cf., Montgomery Environmental Coalition v. Costle,* 646 F.2d 568, 592 (D.C. Cir 1980) (interpreting permit as allowing limited CSO events without effluent limitations).

NWEA next argues that the district court erred by failing to interpret the permit in the public interest. This is "a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open." Corbin, *supra* § 550 at 196. In NWEA's view, the 1984 permit should be interpreted as not allowing the CSOs because "[c]learly it is not in the public interest to construe a permit so as to authorize the gross pollution of public waterways." Reply at 7. The alternative to the CSOs is a total revamping of the Portland sewer system, the cost of which has been estimated at as much as 1.2 billion dollars. E.R. 221. Moreover, until such renovations could be completed, if the excess effluent during storms was not released through the CSOs the effluent would "flood[ ] streets and basements." Sunnarborg Aff., Supp. E.R. 21. Although water pollution is unfortunate, it beggars credulity to argue that this alternative is so clearly more in the public interest than the CSO events.

The district court's findings are not clearly erroneous. There was significant evidence from DEQ, the permit author, to indicate that the CSOs were covered in the 1984 permit. Moreover, DEQ's interpretation, that the CSOs were permitted but not separately listed, does not directly conflict with NWEA's offered extrinsic evidence. Given Sawyer's and Burton's explanations, Gaffi and MacPhearson's concerns about permitting the CSOs can be explained as concern over whether the CSOs should be expressly listed on new permits.

We, accordingly, affirm the district court's finding that the permit authorized limited discharges from the CSOs.

B. DOES NWEA HAVE A CAUSE OF ACTION FOR WATER QUALITY VIOLATIONS?

NWEA argues that the district court erred in finding that it did not have jurisdiction over a citizen suit for the enforcement of the water quality maintenance provision of the NPDES permit.

In the court below NWEA argued that, whether or not the CSOs were specifically permitted under the 1984 NPDES permit, Portland had violated and continued to violate conditions of both the 1984 and 1991 NPDES permits. Specifically, NWEA alleged that Portland's CSO events violated a permit condition prohibiting any discharges that would violate Oregon water quality standards. The 1984 permit held, as a condition in Schedule A, that "[n]otwithstanding the effluent limitations established by the permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality

Standards as adopted in OAR 340-41-445 except in the following defined mixing zone . . . " 1984 Permit, E.R. 223. The mixing zone was defined as a 100 foot radius around the discharge point. *Id.* The 1991 permit contained similar limitations but eliminated the mixing zone provision. It also expressly applied the condition to the CSOs. *See* E.R. 235 *and compare with* E.R. 223. NWEA offered declarations and scientific reports that it argued establish continuing violations of the water quality standards in the waters surrounding the CSOs after CSO events. *See, e.g.,* Portland's Response to Interrogatories, E.R. 119 (failure to meet fecal coliform standards); Thutt Aff., E.R. 164 ("not possible to have any CSO event that would not exceed the DEQ's fecal coliform standard"); Rosolie Aff., E.R. 153-54.

The district court never reached the question of Portland's liability for violations of this permit condition. Instead, the court held that the Act did not grant federal jurisdiction for the citizen enforcement of water quality violations, "because water quality standards do not equal 'effluent standards or limitations under this chapter.'" E.R. 84. A general water quality maintenance condition like the one found in the 1984 and 1991 permits is not the type of "condition" that the court found would trigger federal jurisdiction. Instead, "[g]iven the distinction between effluent limitations and water quality standards, . . . and the problems with analyzing violations of water quality standards as opposed to effluent limitations, . . . state water quality standards can constitute effluent standards, violations of which may be actionable in a citizen suit, only if they are incorporated into an NPDES permit through effluent limitations." E.R. 86. Because the water quality

standards in this case had not been translated into end-of-the-pipe discharge limitations, NWEA was not authorized to bring suit. Finally, the district court stated that to allow enforcement of the standards would be "nonsensical" because it would permit discharges from CSOs in Schedule A while simultaneously prohibiting them. *Id.*

NWEA argues that the district court erred in finding that the provisions of the CWA do not authorize federal jurisdiction for citizen suits to enforce water quality conditions of NPDES permits. Whether expressly stated permit conditions prohibiting discharges that cause water quality violations are enforceable by citizens is a question of first impression in the courts of appeals. We review the district court's interpretation of the statute *de novo*.

The City of Portland correctly points out that the authorities generally reject citizen suit standing to enforce water quality standards. *See Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842, 850 (9th Cir. 1987); *New York v. United States,* 620 F.Supp. 374 (E.D.N.Y. 1985); *McClellan Ecological Seepage Situation (MESS) v. Weinberger,* 707 F. Supp. 1182, 1200 (E.D. Cal. 1988). *But see McClellan Ecological Seepage Situation (MESS) v. Cheney*, 763 F. Supp. 431, 443 (E.D. Cal. 1989); *MESS,* 707 F.Supp. at 1203. We have said "it is not the water quality standards themselves that are enforceable in section 1311(b) (1) (C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards." *Oregon Natural Resources Council,* 834 F.2d at 850; ree *also MESS,* 707 F.Supp. at 1200 ('[I]f a state water quality standard has not been incorporated into an NPDES permit *through an effluent*

limitation, it is outside the scope of section 301(b)(1)(C).") (emphasis added). All of these statements are either in cases distinguishable from the one before us or are dicta. Nevertheless, they do show that whenever courts have been faced with the question, the answer has been that citizen suits cannot be used to enforce water quality standards. The plaintiffs have not cited any authority to us on the other side.[6] They have not been able to find a single case in which a court held that citizen suits could be used to enforce water quality standards, whether the water quality standards were incorporated in a NPDES permit or not.

The starting point for determining whether the CWA provides federal jurisdication for citizen suits attempting to enforce water quality standards must be the statute itself, both the provisions governing citizen suits and those governing the establishment of water quality standards.

Every state is required to promulgate water quality standards. 33 U.S.C § 1313 (a). These standards are then reviewed and either accepted or rejected by the EPA Administrator. *Id.* If it is determined that water quality cannot be maintained or achieved under the normal effluent limitations, the Act authorizes the imposition of stricter

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[6]In *Montgomery Enviromental Coalition v. Fri*, 366 F.Supp. 261, 265 (D. D.C. 1973). the court held that water quality standards were enforceable in ctizens suits, at least until effluents under the Act had been promulgated. However, the court later reversed itself. *See Montgomery Enviromental Coalition v. Washington Suburban Sanitary Commission,* 607 F.2d 378, 381 (D.C. Cir. 1979).

effluent limitations in order to attain and maintain water quality.[7] 33 U.S.C. § 1312; 33 U.S.C. § 1311(b)(1C) (requiring by 1977 any more stringent standard for effluent limitations necessary to meet water quality standards); 40 C.F.R. § 122.44(d)(1)(iii) (requiring stricter effluent limits when necessary to avoid "an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant."); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 1972 U.S.C.C.A.N. 3668, 3712-13 *(hereinafter 1972* U.S.C.C.A.N.); 54 Fed. Reg. 37370, 37373 (Sept. 8, 1990). ("Permits must be written to ensure CSO discharges do not cause violations of water quality standards.").

Federal jurisdiction over citizen suits to enforce the Clean Water Act is authorized in 33 U.S.C. § 1365 (CWA § 505). Section 1365 authorizes private citizens to bring suit in the district court "(1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter 33 U.S.C. § 1365(a) (1) . . . Section 1365(f) states:

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3)

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[7]In this case, DEQ did not translate the relevant water quality criteria into effluent discharge limitations.

standard or performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

Reading the statute in context, reveals the following structure:

> § 1365(a) allows citizen suits to enforce effluent limitations;
>
> § 1365(f) defines effluent limitations as end-of-pipe limitations and permit violations;
>
> § 1311 et seq. establish a NPDES permit system to require end-of-pipe effluent limitations tailored to achieve water quality standards.

33 U.S.C. § 1342 sets out the requirements for issuance of NPDES permits. Section 1342 allows NPDES permits to be issued which "apply, and insure compliance with, any applicable requirements of 33 U.S.C. §§ 1311, 1312, 1316, 1317, and 1343," as well as 33 U.S.C. § 1318. 33 U.S.C. §§ 1342(b)(1)(C) and 1342(b)(2)(A). These sections require, inter alia, that pollutant discharges meet effluent-limitations calculated to achieve water quality standards. *See* 33 U.S.C. §§ 1311(b)(1)(C) and 1312(a). None of these sections, however, require that a *permittee* directly comply with water quality standards. Rather, it is the duty

of the *permit-issuing authority* to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met. *See Oregon Natural Resources Council v. United States Forest Service,* 834 F.2d 842, 850 (9th Cir. 1987).

The permit at issue in the instant case fails to set out such limitations as to the CSOs. Since plaintiffs in the instant case have not alleged violations of end-of-pipe effluent limitations or of any other permit conditions contemplated by 33 U.S.C. § 1342, they lack standing to sue under 33 U.S.C. § 1365.

The cases that have found standing to enforce reporting requirements of NPDES permits are distinguishable from the instant case because permits are required to include reporting requirements pursuant to 33 U.S.C. §§ 1342 and 1318. *See, e.g., Sierra Club v. Simkins Industries, Inc.,* 847 F.2d 1109, 1115 n.9 (4th Cir. 1988) ("the reporting requirements of the Act and Simkins' NPDES permit are essential elements of the Clean Water Act's enforcement procedures"); see also *Menzel v. County Utilities Corp.*, 712 F.2d 91 (4th Cir. 1983).

A careful reading of the legislative history provides evidence supporting both NWEA's and the district court's interpretation of § 1365. As NWEA points out, in explanation the meaning of § 1365(f), the Senate Committee on Public Works implied that there were *no* limits on the types of permit conditions that would be enforceable. "In addition to violations of section 301(A) citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued

under section 402." 1972 U.S.C.C.A.N. at 3747. This broad statement does not exist in a vacuum however. For instance, earlier in the same document, a more limited statement of the scope of citizen enforcement was made. There the Comniittee stated that citizens could bring enforcement actions "against those who violate effluent standards or compliance orders." *Id.* 3677. No mention is made of general water quality conditions.

Moreover, when the broad statement of jurisdiction is read in conjunction with the balance of the legislative history, the backdrop of the 1972 Amendments and the practical considerations surrounding cases of this sort, it becomes clear that Congress did not intend such a limitless grant of jurisdiction when it enacted § 1365(f)(6).

The 1972 Amendments to the Clean Water Act reflect a 180 degree shift in the governments' attempts to control water pollution. Prior to 1972, the Federal Water Pollution Control Act approached the job of protecting and preserving the nation's waters through a program of establishing and enforcing water quality standards. Under the pre-1972 legislation, the federal government was authorized to bring enforcement actions whenever it determined that these standards were being violated. Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act,* 36 Vand. L. Rev. 1167, 1178 (1983). This approach was soon found wanting. Enforcement of the standards was almost non-existent. *Id.* at 1179 (only one enforcement action brought before 1972).

There were philosophical dfficulties with this approach

which approved of pollution up until the point that it caused damage. The Amendments took the position that all discharges were impermissible unless specific authorization, through the discharge permit system, was granted. Whereas earlier legislation focused on the quality of the receiving waters, the 1972 Amendments focused on the quality and nature of the effluent being discharged into those waters, with a goal of reducing and eventually eliminating all discharges.

This change in emphasis to an act geared towards discharge limits is reflected throughout the legislative history. *See, e.g.,* 1972 U.S.C.C.A.N. 3675 ("The legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits."). Although the 1972 Amendments retain some role for water quality standards, *see* 33 U.S.C. §§ 1312 and 1313, that role has changed. Prior to 1972, water quality standards served as both the end goal and the mechanism for achieving that goal. Under the 1972 Amendments, water quality standards remain the goal, however discharge limits have taken over as the mechanism. *See* 1972 U.S.C.C.A.N. 3675 ("the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement"). Thus "[t]he new law must build upon the existing foundation of water quality standards and employ effluent limitations as a tool for the achievement of those standards." Hearings on H. R. 11896, Before the Comm. on Public Works, 93d Cong. lst Sess. 1180 (1972) (statement of Hon. William D. Ruckleshaus,

Admin., Environmenml Protection Agency), *reprinted in 1* A Legislative History of the Water Pollution Control Act Amendments of 1972 at 1180 *(1972) (hereinafter Legislative History); see also* Sen. Consideration of the Report of the Conference Committee, *reprinted in Legislative History* at 171 (statement of Sen. Muskie) ("To the extent the State may wish to continue an examination of water quality in order to determine if more restrictive effluent limits may be required, this section [1313] will be useful."); 33 U.S.C. § 1312; 1972 U.S.C.C.A.N. 3710 ("the Administrator is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability."); *id.* ("It is not the intent of the committee to in any way restrict the Administrator, or the States from applying higher levels of control than best practicable where necessary to achieve standards established pursuant to the 1965 Act . . ."); *id.* at 3712 ("To the extent that water quality standards can be used to generate firm data on necessary effluent-limitations this enforcement tool should be available.").

Congress also emphasized the primacy of discharge limits. For instance Congressman Harsha of Ohio stated during consideration of the conference committee bill that "those individuals were wrong who stated that this [§ 1313] was intended to be a weakening of the effluent limitations approach and a continuation of the old water quality standard based approach to water quality control which did not prove as effective as it could have been." House Consideration of the Rept. of the Conf. Comm. *reprinted in Legislative History* at 246. In fact, to the extent that the EPA's resources required prioritizing, Congress stated that

it "should assign secondary priority to this [§ 1313] provision." Sen. Consideration of the Report of the Conference Committee, *reprinted in Legislative History* at 171 (statement of Sen. Muskie).

The Amendments also ameliorated evidentiary and enforcement problems that were inherent in the earlier legislation. The pre-1972 Act required the government to prove that the defendant's discharges were the cause of water quality violations in receiving waters that might be subject to more than one discharger. *See Gaba, supra* at 1179. With discharge limitations, a more objective task was given to the courts. Now in order for a court to determine liability, it need only compare the quality and quantity of the alleged polluter's discharge to the limits set forth in the applicable NPDES permit. If the discharges exceed the permit limits, the discharger has violated the Act; if they do not, there is no violation or liability. Thus, "[a]n alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore an objective evidentiary standard will have to be met by any citizen who brings an action under this section." 1972 U.S.C.C.A.N. at 3745. The enforcement of a general water quality maintenance condition in a permit, however, would require the court to engage in just the subjective analysis of technological considerations that Congress sought to avoid under § 1365. Congress's emphasis on the evidentiary simplicity of enforcement actions precludes the enforcement of water quality standards that have not been translated into effluent

discharge limitations. Practical considerations also militate in favor of an interptetation that does not allow for jurisdiction in this case. Under a water quality based enforcement scheme such as the pre-1972 Act, dischargers faced problems in planning and regulating the legality of their actions because this legality is dependent on natural conditions such as the weather and third parties' discharges. *See* Rodgers at 250. As a practical matter, NWEA's interpretation of § 1365 places dischargers such as the City in the same untenable pre-1972 position. No matter how much planning the City were to engage in, as long as it discharges effluent from the CSOs even under the auspices of a duly authorized permit, it is in danger of being in violation of the Act. Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for the future with the assurance that if they remain within concrete permit parameters, they will remain on the correct side of the law.

Congress's statements in the legislative history that liability determinations under the 1972 amendments would be objective and non-technical, as well as the emphasis on the translation of water quality standards into discharge limitations convinces this court that the single reference to "any condition of any permit" cannot be read as broadly as NWEA suggests without eviscerating Congress's intent to restructure and revamp the statute. Citizens may still object in the state courts to the terms of a proposed NPDES permit when it is issued if they find that the effluent limitations are insufficient to protect and preserve water quality. ORS 183 484(2)(challenge to permit contents must be brought within 60 days of issuance). Given the legislative history and the practical problems that NWEA's

interpretation of the statute would entail, the court finds that under 33 U.S.C. § 1365, water quality standards are unenforceable by way of a citizen suit unless they have been translated into end-of-the-pipe effluent limitations. Therefore, the district court's holding is affirmed.

C. PROCEDURAL DETERMINATIONS

In the court below, Portland asserted two other jurisdictional arguments upon which NWEA now seeks a determination. Portland argued that 1) the case was moot because of the changes in the 1991 permit; and 2) any action was barred under 33 U.S.C. § 1319(g)(6) by DEQ's subsequent enforcement actions. Because NWEA claims entitlement to attorney's fees based on thealleged violations of the old permit, and seeks to enforce the water quality standards independently of the effluent limitations, a live and genuine controversy remains, so the case is not moot.

III. CONCLUSION

We AFFIRM the district court's holdings that the 1984 permit covered the CSOs and that 33 U.S.C. § 1365(a) does not confer jurisdiction for citizen suits to enforce water quality standards when they are conditions of a permit. Accordingly we decline to reach the questions of mootness and whether 33 U.S.C. § 1319 bars jurisdiction.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in all parts of the majority opinion except the

finding that Northwest Environmental Advocates ("NWEA") lacks standing to bring a citizen suit under the Clean Water Act ("CWA") § 505(a)(1) [33 U.S.C. § 1365(a)(1)], to enforce water quality standards contained in NPDES permits. Portland holds an NPDES permit, and the water quality standards are conditions of its permit. Both the plain language of § 1365(a)(1) and case law support a finding of citizen suit jurisdiction in this case, and I am unpersuaded by the majority opinion's reasoning that legislative history and practical considerations preclude jurisdiction. I therefore respectfully dissent.

As the majority opinion points out, the plain language of § 1365(a) authorizes citizens to enforce *all* permit conditions. That section provides: "[A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violaiton of (A) an effluent standard or limitation under [the Clean Water Act]. . . ." 33 U.S.C. § 1365(a)(1)(A). An effluent standard or limitation includes "(2) an effluent limitation or other limitation under section 1311 . . . or (6) a permit or condition thereof. . . ." 33 U.S.C. § 1365(f)(2), (f)(6) (emphasis added). Although this language clearly contemplates citizen suits to enforce "a permit or condition thereof," the majority opinion concludes that the section allows citizens to enforce only those water quality standards that are translated into permit effluent limitations.

To reach what I regard as an erroneous conclusion, the majority opinion, I believe, misconstrues the effect of the legislative history of the 1972 amendments to the CWA. I agree that the 1972 CWA amendments reflect Congress' dissatisfaction with the system of water quality standards,

but nowhere does Congress evidence an intent to *preclude* the enforcement of water quality standards that have not been translated into effluent discharge limitations. The fact that Congress created a new, simpler enforcement method based on effluent limitations does not mean that Congress intended to foreclose citizen suit enforcement of water quality standards. In fact, the legislative history convinces me of just the opposite.

By introducing effluent limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system. In the legislative history, the Senate Committee first outlined the dual purposes of water quality standards: "The standards are intended to function . . . [a]s a measure of performance . . . [and] to provide an avenue of legal action against polluters. If the wastes discharged by polluters reduce water quality below the standards, actions may be begun against the polluters." S. Rep. No. 414, 92nd Cong., 2nd Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671; 40 C.F.R. § 131.2 (1992) (dual purposes). Next, the Committee expressed dismay over the "almost total lack of enforcement" under the old system that depended exclusively upon water quality standards. 1972 U.S.C.C.A.N. at 3672 ("[O]nly one case has reached the courts in more than two decades."). Given Congress' concern about *non*-enforcement, the majority opinion is incorrect when it takes a narrow view of Congress' broad provision for "citizen participation in the enforcement of control requirements and regulations established under [the CWA] . . . ." *Id.* at 3745.

Moreover, citizen suit enforcement of water quality standards is necessary to complement enforcement of

effluent limitations. Water qualtiy standards "often cannot be translated into effluent limitations. . . ." *Id.* at 3675. For example, certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids). *See* Or. Admin. R. 340-41-445(2)(f), (l), (k). Even after the 1972 amendments, states may adopt similar standards and express water quality criteria "as constituent concentrations, levels, or narrative statements. . . ." 40 C.F.R. 131.3(b)(1992).

Many discharges remain unregulated and primarily subject to water quality standards, despite statutory deadlines for achieving effluent limitations, 33 U.S.C. § 1311(b)(1)(A) (1977 deadline for first-stage effluent limitations on all point source discharges), § 1311 (b)(2) (West 1993 Supp.) (1989 deadline for second-stage, more stringent controls). Futhermore, in cases where effluent limitations do apply, they serve only as national, minimum requirements; states may adopt stricter, enforceable water quality standards and limitations. 33 U.S.C. § 1370.

By interpreting § 1365(a)(1) to exclude citizen suit enforcement of water qaulity standards that are not translated into quantitative limitations, the majority opinion immunizes the entire body of qualitative regulations from an important enforcement tool.[1] The rule is especially

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[1]Also, the majority opinion's interpretation effectively attributes to Congress an intent to stall citizen suit enforcement of permit terms that specify water quality

troubling in this case, because no effluent limitations cover the discharges from Portland's combined sewer overflows ("CSOs"). Nor can citizens find consolation in their state court remedy of objecting to the contents of a permit within sixty days of its issuance, Or. Rev. Stat. 183 484(2). Citizens groups such as NWEA might not wish to dispute the issuance or contents of a permit, but to enforce the permit's terms. The majority opinion precludes them from doing so. Qualitative standards are not too difficult for courts to enforce. The majority's decision eliminates the *only* practicable way for citizens to challenge CSO discharges.

The legislative history of the amendments neither dictates nor supports this result. In fact, parts of the legislative history reflect Congress' intention to grant *broad* authority for citizen enforcement, consistent with the statutory language. In the legislative history, the Senate Committee expressly stated that "*[i]n addition to violations of section 301(a)* [26 U.S.C. § 1311, Effluent Limintations] citizens are granted authority to bring enforcement actions for violations of . . . *any condition of any permit* issued under section 402 [26 U.S.C. § 1342]." 1972 U.S.C.C.A.N. at 3747 (emphasis added). Also, the Committee explained that it modeled the citizen suit provision on the analogous

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standards. Congress set deadlines for promulgation of effluent limitations, and therefore, must have anticipated a five-year lag, 1972-1977, before universal applicability of effluent limitations. Nothing in the legislative history indicates that Congress intended to stall citizen enforcement of permit terms until promulgation of effluent limitations.

Clean Air Act ("CAA") provision that applies to air pollution permit conditions.[2] *Id.* at 3745.

Finally, the majority opinion overlooks ample case law that supports a finding of citizen suit jurisdiction in this case. The Supreme Court has acknowledged citizen standing, under § 1365(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards. *See E.P.A. v. California*, 426 U.S. 200, 224-25, 96 S.Ct. 2022, 2033-34, 48 L.Ed.2d 578 (1976). By applying § 1365(f)(6), several courts have held that there is jurisdiction under which citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 1365(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports. *See, e.g., Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) ("Simkins' reporting requirements are expressly made conditons of its permit, and therefore violations of these conditions, by operation of § 1365(f)(6), are violations of an effluent standard or limitation of § 1365(a)."), *cert. denied,* 491 U.S. 904, 109 S.Ct. 3185,

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[2]The Clean Air Act ("CAA") provision authorizes citizen suits for alleged violations of "an emission standard or limitation under [CAA] . . . [,defined in relevant part as an] emission limitation, standard of performance or emission standard, . . . *or any condition or requirement of a permit* under . . . [sections of CAA] . . . or under an applicable [state] implementation plan." 42 U.S.C. § 7604(a), (f)(emphasis added).

105 L.Ed.2d 694 (1989). Other examples of enforceable permit conditions include conditions relating to sewage maintenance, *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), *aff'd*, 644 F.2d 995 (3rd Cir. 1981), and construction schedules, *Locust Lane v. Swatara Township Auth.*, 636 F. Supp. 534, 539 (M.D. Pa. 1986) (rejecting defendant's attempt "to impose a limitation on § 1365 where one is neither supported by the language nor the legislative history"). Finally, citizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the CWA, namely discharges that may never reach navigable waters. *Connecticut Fund for Env't v. Raymark Indus., Inc.*, 631 F.Supp. 1283, 1285 (D. Conn. 1986).[3]

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[3]When this Court and other courts have held that citizens may not enforce water quality standards under § 1365(a)(1), they addressed standards that were *not included in a NPDES permit*. *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) (suit to enforce water quality standards allegedly breached by nonpoint sources, which are never regulated by NPDES permits); *McClellan Ecological Seepage v.Weinberger*, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988) (finding no citizen suit jurisdiction existed, because "a state water quality standard can constitute an effluent standard or limitation enforceable under section 505 only if it has been incorporated into an NPDES permit"); *Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 381 (D.C. Cir. 1979).

Because the statutory language, legislative history, and case law demonstrate that citizens *have* authority to enforce permit conditions stated in terms of water quality standards, I would find the NWEA has standing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVRONMENTAL ADVOCATES, A Non-Profit Oregon Corporation; and NINA BELL, Plaintiffs-Appellants, v. CITY OF PORTLAND Defendant-Appellee.	) No. 92-35044) DC No.) CV 91-339-PA)))) ORDER AND) OPINION)

June 7, 1995

PREGERSON, Circuit Judge:

Northwest Environmental Advocates and Nina Bell ("NWEA") appeal the district court's judgment in favor of Portland on their claims that the City is violating the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq. On April 16, 1991, NWEA filed suit in the district court alleging that Portland's practice of discharging raw sewage during times of precipitation from 54 outfall points was not covered by a permit and that the practice had caused and was continuing to cause violations of Oregon's water quality standards. After a trial on the written record, the district court held that (1) the contested discharge points were covered by Portland's pollution permit, and (2) the court lacked jurisdiction to consider NWEA's water quality violation claims.

In *Northwest Environmental Advocates v. City of Portland*, 11 F.3d 900 (9th Cir. 1993) (Northwest), we affirmed. We

held that the contested discharge points were covered by Portland's pollution permit, *id.* at 903-06, and we held that Northwest Environmental Advocates lacked standing to bring a citizen suit under § 505(a)(1) of the Clean Water Act, 33 U.S.C.1365(a)(1), to enforce water quality standards contained in Portland's permit. *Id.* at 906-11. On December 28, 1993, NWEA filed a petition for rehearing with suggestion for rehearing en banc. While this petition was still pending, the Supreme Court decided PUD No. 1 of *Jefferson County v. Washington Department of Ecology,* 114 S. Ct. 1900 (1994) (Jefferson County).[1]

Jefferson County cast into considerable doubt our holding in *Northwest* that Citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-pipe effluent limitations. In light of *Jefferson County* and upon reconsideration of our prior opinion in *Northwest*, we now vacate that opinion, 11 F.3d at 900-913, and issue the following opinion.

I. BACKGROUND

A. The Portland Sewage Treatment System

At issue is the operation of the Portland sewer system.

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[1] On April 25, 1994, the case failed to receive a majority of votes for consideration en banc. The panel then resumed control of the case. However, before the panel issued the final 5.4(b) Order, the Supreme Court decided *Jefferson County.*

Portland operates a sewage treatment system that includes a network of combined sewage and stormwater pipes. Although the construction of these combined sewer pipes was discontinued in 1962, approximately 70% of the City's sewers remain combined sewers. Supp. E.R. 21. The effluent flowing in the system ideally is intercepted and transported to the Columbia Boulevard Treatment Plant where it is treated and then discharged into the Columbia River through two outfalls (Nos. 001 and 002). The interceptors can carry only "'three times [the] average dry weather flow'" of effluent to the treatment plan. Sunnarborg Aff., Supp. E.R. 21. When the flow exceeds the plant's capacity, as can occur during periods of precipitation, the effluent is released untreated through a system of combined sewer overflow (CSO) outfalls in what is termed a CSO event. There are between 50 and 80 CSO events every year in Portland. E.R. 216; *see also* Bureau of Environmental Services, City of Portland, Columbia Slough Planning Study Background Report (1989) (there are between 67 and 79 CSO events per year in the Columbia Slough).

Portland has 54 CSO outfalls; 12 drain into the Columbia Slough and 42 drain into the Willamette River. These waterways and their environs are used by Portland residents for recreation, including water contact activities such as boating. The release of untreated sewage into such public waters can present health risks. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) ("CSOs have been shown to have severe adverse impacts on human health under certain conditions."). Appellants have supplied both anecdotal and scientific evidence of the polluted nature of the Willamette

River and the Columbia Slough, especially during and immediately after CSO events. *See, e.g.*, Portland's Response to NWEA's Interrogatories, E.R. 119; Thutt Aff., E.R. 159-178; Pratt Aff., E.R. 20.

Abatement of CSO events is not easy. It has been estimated that to solve the problem in Portland alone will cost between $500 million and $1.2 billion dollars. E.R. 221. Estimates for the entire nation are between $70 billion and $109 billion dollars. Environmental Groups Call for Effort to Deal with Combined Sewer Problems, 23 Env. Rptr. (BNA) 13 (1992) (upgrades could start at between $70 and $80 billion dollars); Combined Sewer Overflow Problems Demand New Approach, Local Officials Say, 20 Env. Rptr. (BNA) 1939 (1990) (costs could be as high as $109 billion).

B. Proceedings in the District Court

On February 1, 1991 NWEA gave written notice to Portland, the EPA Administrator, the State of Oregon, and the EPA Regional Administrator of its intent to file suit in the district court challenging the legality of the CSO discharges. Complaint, E.R. 9. In April 1991, after the required 60 day notice period, NWEA filed this action.

The crux of the NWEA complaint was that the 54 CSO outfalls being used regularly by the City were not covered by the City's 1984 National Pollution Discharge Elimination System (NPDES) permit. Because unpermitted discharges of pollutants are illegal, NWEA argued the City was violating the CWA. Even if the CSOs were covered by the permit, NWEA argued that the discharges violated

Oregon water quality standards and therefore violated a condition of the Permit. These violations were ongoing and likely to continue. NWEA prayed for injunctive relief and civil penalties. Complaint, E.R. 10-11.

The 1984 permit was to expire in July 1989. However it remained in effect until Portland and the Oregon Department of Environmental Quality (DEQ)[2] were able to complete the renewal process and agree on the terms of a new permit. DEQ forwarded a draft of a proposed renewal permit to Portland in December 1990. This draft permit required the City to "meet water quality standards at all discharge points, including CSOs, ..." Because Portland could not meet the five year time table set forth in the proposed renewal permit, *id.*, the parties determined that a compliance order separate from the renewal permit, and requiring eventual abatement of all CSO events, was appropriate. After a period of Notice and Comment, Portland and the DEQ came to an agreement in August 1991. Under that settlement, Portland's new permit specifically listed the CSOs as permitted discharge points. In addition to the permit, the parties entered into a stipulation and final order (SFO) in which Portland agreed to replace the CSO system within the next 20 years.

Once these negotiations had been completed, Portland filed a motion to dismiss and the parties filed cross-motions for summary judgment. The court bifurcated the proceedings; first it would address whether Portland could be held liable

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[2]National Pollution Elimination Discharge Permits in Oregon are issued by DEQ.

for violations of the CWA, and then if necessary, determine whether violations had occurred and impose any necessary penalties. The parties stipulated to a trial of the liability phase on the summary judgment submissions, allowing the court to decide questions of fact as well as questions of law. Amended Opinion, E.R. 73.

After reviewing the submissions the district court issued an opinion and judgment. It later filed an amended opinion which was essentially the same as the original. The court found that Portland's 54 CSOs were covered by the 1984 NPDES permit, and thus that the City was not in violation of the Act for allowing unpermitted discharges. It also rejected NWEA's claim that Portland would nonetheless be liable for violating Oregon's water quality standards because the CWA did not confer federal jurisdiction to entertain citizen suits to enforce state water quality standards.

II. ANALYSIS

A. Does the 1984 Permit Cover the CSOs?

In the court below, NWEA argued that Portland had violated and continued to violate the CWA by discharging through unpermitted outfalls. The district court found otherwise, holding that the relevant NPDES discharge permit authorized CSO events under specific circumstances. NWEA asserts that the district court erred in so interpreting the permit.

We review the district court's interpretation of the 1984 permit as we would the interpretation of a contract or other

legal document. When reviewing a district court's interpretation of such a writing, the court reviews *de novo* the determination of whether it is ambiguous. *In re U.S. Fin. Sec. Litig.*, 729 F.2d 628, 632 (9th Cir. 1984). Interpretation of an unambiguous writing is also a question of law subject to *de novo* review. *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Ben. Admin. Inc.*, 688 F.2d 1228, 1230 (9th Cir. 1982). If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error. *U.S. Fin. Sec.*, 729 F.2d at 632; *Culinary & Service Employees Union*, 688 F.2d at 1230; *In re Agricultural Research & Technology Group, Inc.*, 916 F.2d 528, 537 (9th Cir. 1990).

NWEA argued in the court below that the 1984 permit covered only two point sources, outfalls 001 and 002 from the treatment plant.[3] The 1984 permit expressly "covers" only two points sources, outfalls 001 and 002 from the treatment plant. These outfalls are listed on the first page of the permit as the "SOURCES COVERED BY THIS PERMIT." E.R. 222. The 54 CSOs are not listed in this section. The first page of the permit also states that the receiving waterway for these discharges is the Columbia River. The Willamette River and the Columbia Slough are not mentioned.

Immediately below the section listing "SOURCES COVERED," the permit provides a description of the

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[3]Effluent from outfalls 001 and 002 has been treated before it is discharged into the Columbia River.

activities that are covered by the permit. This section, "PERMITTED ACTIVITIES," states that Portland is authorized to "operate a waste water collection, treatment, control and disposal system and discharge to public waters adequately treated waste waters only from the authorized discharge point or points established in Schedule A . . . ." E.R. 222 (emphasis added). Schedule A provides the effluent limitations for outfalls 001 and 002. More importantly, however, it provides that:

> The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).[4]

E.R. 223. Thus, on the face of the permit it appears that CSO events were considered to be a "permitted activity." Finally, Schedule C provides that the City must "continue to work toward the separation of sanitary sewage and storm water in presently developed areas in which this method is cost effective." E.R. 224.

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[4]The parties do not dispute that "diversion structure" refers to the CSOs. In earlier permits, the 54 CSOs were listed in this provision of the permit. *See* Supp. E.R. 13 (1979 permit, "Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow."); Supp. E.R. 2 (1974 permit - same).

NWEA contends that the court should only heed the first portion of the permit listing covered sources.[5] Because the CSOs are not specifically listed on page one as permitted sources, NWEA argues, they must not have been encompassed by the permit and are therefore illegal. To follow this reasoning would require the court to read the references to diversion structures out of the permit altogether. The limitations on the frequency of CSO events and the requirement that Portland work towards upgrading its sewer system would then constitute mere surplusage.

The 1984 permit is clear on its face in permitting CSO events under specified conditions. The description of permitted activities specifically allows Portland to operate a sewage system and to discharge through two separate sets of discharge points, those listed on page one as authorized discharge points, and those described and listed on Schedule A.

The extrinsic evidence presented to the district court only strengthens this conclusion. The parties each offered evidence, in the form of affidavits and other documentary evidence, to support their respective understandings of the 1984 permit. NWEA relied mainly on four documents to

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[5]NEA attempts to downplay the importance and placement of the references to diversion structures, implying that they are somehow a part of the fine print. In reality however, the limitations on the frequency of CSO events appears in normal sized type on page two of the permit, directly below the effluent limits for discharges from outfalls 001 and 002. *See,* E.R. 223.

support the position that the CSOs were not, and had never been, permitted. The first was a letter from W.C. Gaffi, Portland's Chief Engineer, to DEQ in 1988. Gaffi stated that "the City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so." E.R. 278. The second document was an October 1990 memorandum from two members of the Portland Bureau of Environmental Services. In this memo, Linda MacPherson and Dave Kliewer indicated the need to set up a "discussion to determine if the CSOs are going to be permitted or not?" E.R. 279. The third is an undated memorandum in which a DEQ employee wrote that "the potential exists for permitting both the storm and combined sewer discharges." E.R. 191. NWEA argues that these three documents imply that the CSOs were not covered under the 1984 permit, because if they were, there would be no need to address including them in future permits.

Finally, NWEA offered a DEQ policy statement entitled "Strategy for Regulating Combined Sewer Overflows."[6] The report states that "none of these outfalls [the CSOs] are covered by a permit, however, all are proposed to be addressed in the Portland-Columbia Blvd STP permit renewal." E.R. 208. NWEA argues that this statement proves that DEQ had not permitted the CSOs in the 1984

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[6]This February 1991 document appears to have been prepared in response to the EPA's National Combined Sewer Overflow Control Strategy. *See* 54 Fed. Reg. 37370 (Sept. 8, 1989).

permit. Portland, however, offered an affidavit by the author of the report to explain the statement. Barbara Burton explained that the quoted text did not mean that Portland's CSOs were not covered by an NPDES permit, and therefore were illegal. Instead, it was intended to convey that "none of the outfalls were individually listed with effluent limitations in Portland's 1984 NPDES permit." E.R. 281 (emphasis in original).

Barbara Burton's impression of the scope of the Portland NPDES permit was shared by Harold L. Sawyer, formerly the Water Quality Division Administrator for DEQ. E.R. 282. Sawyer stated in his affidavit that "Portland's entire sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits." E.R. 283. According to Sawyer, DEQ knew, and always had known, that the Portland sewer system operated through a system of CSOs and treatment plants. *Id.* Moreover, "if DEQ had considered combined sewer overflows to be outside of Portland's NPDES permit, as Water Quality Division Administrator for DEQ [he] would have proposed a specified program and schedule for treatment or elimination of such discharges for incorporation in the permit or in a separate compliance order." *Id.* These are the steps that DEQ took in 1991. Thus, "DEQ understood that Portland would continue to operate its combined sewer system as it had been operating the system prior to the existence of the NPDES permitting program, to prevent dry weather combined sewer overflows except during abnormal storm events." *Id.* at 285.

This position is repeated in the 1991 SFO. DEQ stated that "as a matter of policy the Department [DEQ] did not

always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system. . . [Portland's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs." E.R. 260-61.

The district court, having reviewed these conflicting statements, found Portland's interpretation to be persuasive. The court recognized the import of the Gaffi letter, but determined that it was "not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permit and when construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges." E.R. 83. The Sawyer and Burton affidavits were more persuasive because their explanations of the 1984 permit comported with the language of the permit itself. *Id.*

NWEA argues that, notwithstanding the extrinsic evidence, under the rules of contract interpretation the court must find that the CSOs were not covered by the 1984 permit. Courts should, if possible, interpret a contract so that its terms will not be illegal. *See* Corbin, Contracts§546 at 169 (1960). This rule is advisory and should not be applied blindly to the detriment of the parties' intentions. "[A] specific provision in an otherwise valid contract should not be given a meaning that would have a legal effect that the court is convinced the parties did not intend, even though any alternative meaning will cause the provision to have no legal effect whatever." *Id.*

Under the regulations promulgated pursuant to § 1342 of the Clean Water Act, all NPDES permits should establish technology-based effluent limitations for all permitted point sources. 40 C.F.R. 122.44(a). Although technically the permit should have established effluent limitations for the CSOs, it appears that the parties intended to omit such requirements. The district court was presented with sufficient evidence from which it could determine that DEQ, as well as Portland, intended this allegedly unlawful interpretation. EPA approved the terms of the permit, including the absence of effluent limitations for the CSOs, even though the existence of the CSOs was clear on the permit's face. Moreover, prior to 1989, it appears that many state permitting bodies believed that CSO outfalls could be permitted without being subjected to effluent limitations. *See National Combined Sewer Overflow Control Strategy*, 54 Fed. Reg. 37370, 37371 (1989) (proposed regulations to "control effluents from combined systems which are not regulated under the sanitary system standards nor as discharges from separate storm sewer regulations"). *Cf., Montgomery Environmental Coalition v. Costle,* 207 U.S. App. D.C. 233, 646 F.2d 568, 592 (D.C. Cir. 1980) (interpreting permit as allowing limited CSO events without effluent limitations).

NWEA next argues that the district court erred by failing to interpret the permit in the public interest. This is "a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open." Corbin, *supra* § 550 at 196. In NWEA's view, the 1984 permit should be

interpreted as not allowing the CSOs because "clearly it is not in the public interest to construe a permit so as to authorize the gross pollution of public waterways." Reply at 7. The alternative to the CSOs is a total revamping of the Portland sewer system, the cost of which has been estimated at as much as 1.2 billion dollars. E.R. 221. Moreover, until such renovations could be completed, if the excess effluent during storms was not released through the CSOs the effluent would "flood [ ] streets and basements." Sunnarborg Aff., Supp. E.R. 21. Although water pollution is unfortunate, it beggars credulity to argue that this alternative is so clearly more in the public interest than the CSO events.

The district court's findings are not clearly erroneous. There was significant evidence from DEQ, the permit author, to indicate that the CSOs were covered in the 1984 permit. Moreover, DEQ's interpretation, that the CSOs were permitted but not separately listed, does not directly conflict with NWEA's offered extrinsic evidence. Given Sawyer's and Burton's explanations, Gaffi and MacPherson's concerns about permitting the CSOs can be explained as concern over whether the CSOs should be expressly listed on new permits. We, accordingly, affirm the district court's finding that the permit authorized limited discharges from the CSOs.

B. Does NWEA Have a Cause of Action for Water Quality Violations?

NWEA argues that the district court erred in finding that it did not have jurisdiction over a citizen suit for the enforcement of the water quality maintenance provision of

the NPDES permit. In the court below NWEA argued that, whether or not the CSOs were specifically permitted under the 1984 NPDES permit, Portland had violated and continued to violate conditions of both the 1984 and 1991 NPDES permits. Specifically, NWEA alleged that Portland's CSO events violated a permit condition prohibiting any discharges that would violate Oregon water quality standards. The 1984 permit held, as a condition in Schedule A, that "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in OAR 340-41-445 except in the following defined mixing zone . . ." 1984 Permit, E.R. 223. The mixing zone was defined as a 100 foot radius around the discharge point. *Id.* The 1991 permit contained similar limitations but eliminated the mixing zone provision. It also expressly applied the condition to the CSOs. *See* E.R. 235 and compare with E.R. 223. NWEA offered declarations and scientific reports that it argued establish continuing violations of the water quality standards in the waters surrounding the CSOs after CSO events. *See, e.g.*, Portland's Response to Interrogatories, E.R. 119 (failure to meet fecal coliform standards); Thutt Aff., E.R. 164 ("not possible to have any CSO event that would not exceed the DEQ's fecal coliform standard"); Rosolie Aff., E.R. 153-54.

The district court never reached the question of Portland's liability for violations of this permit condition. Instead, the district court held that § 505 of the Clean Water Act, 33 U.S.C. § 1365, did not grant federal jurisdiction for the citizen enforcement of water quality violations, "because water quality standards do not equal 'effluent standards or

limitations under this chapter.'" E.R. 84. The court concluded that violations of water quality standards may be actionable "only if they are incorporated into an NPDES permit through effluent limitations." E.R. 86. Because the plain language of CWA § 505, the legislative history, and case law support a finding of citizen suit jurisdiction in this case, we reverse on this issue.

[6] The plain language of CWA § 505 authorizes citizens to enforce all permit conditions. That section provides: "[A]ny citizen may commence a civil action . . . (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the Clean Water Act] . . . ." 33 U.S.C. § 1365(a)(1)(A). An effluent standard or limitation includes "(2) an effluent limitation or other limitation under section 1311 . . . or (6) a permit or condition thereof . . . ." 33 U.S.C. § 1365(f)(2), (f)(6) (emphasis added). This language clearly contemplates citizen suits to enforce "a permit or condition thereof". Portland holds a National Pollutant Discharge Elimination System (NPDES) permit,[7] and the water quality standards are conditions of its permit.

Portland argues that § 505 allows citizens to enforce only those water quality standards that are translated into effluent limitations. To support this argument, Portland reasons that the effluent limitations, which were imposed

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[7]As noted above, the NPDES permit program makes it unlawful for any person to discharge a pollutant without obtaining an NPDES permit from the State and complying with its terms. 33 U.S.C. § 1342.

by the 1972 amendments to the CWA, effectively displaced water quality standards as the primary means of regulating pollution. Portland explains that Congress retained water quality standards as the ultimate goal of pollution control, but sought to achieve this goal through end-of-the-pipe limitations.

Portland misconstrues the effect of the legislative history of the 1972 amendments to the CWA. To be sure, the 1972 CWA amendments reflect Congress' dissatisfaction with the system of water quality standards. But nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations. The fact that Congress created a new, simpler enforcement method based on effluent limitations does not mean that Congress intended to foreclose citizen suit enforcement of water quality standards. In fact, the legislative history indicates just the opposite.

By introducing effluent limitations into the CWA scheme, Congress intended to improve enforcement, not to supplant the old system. In the legislative history, the Senate Committee first outlined the dual purposes of water quality standards: "The standards are intended to function . . .[a]s a measure of performance . . . [and] to provide an avenue of legal action against polluters. If the wastes discharged by polluters reduce water quality below the standards, actions may be begun against the polluters." S. Rep. No. 414, 92nd Cong., 2nd Sess. 2 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3671; 40 C.F.R. § 131.2 (1992) (dual purposes).

Next, the Committee expressed dismay over the "almost total lack of enforcement" under the old system that depended exclusively upon water quality standards. 1972 U.S.C.C.A.N. at 3672 ("[O]nly one case has reached the courts in more than two decades."). Given Congress' concern about non-enforcement, Portland erroneously takes a narrow view of Congress' broad provision for "citizen participation in the enforcement of control requirements and regulations established under [the CWA] . . . ." *Id.* at 3745.

The Senate Committee expressly stated that "[i]n addition to violations of section 301(a) [26 U.S.C. § 1311, Effluent Limitations] citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued under section 402 [26 U.S.C. § 1342]." 1972 U.S.C.C.A.N. at 3747 (emphasis added).[8] Also, the Committee explained that it modeled the citizen suit provision on the analogous Clean Air Act ("CAA") provision that applies to air pollution permit conditions.[9]

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[8] See also *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 16-17 (1981) (recognizing that the "broad category of potential plaintiffs" envisioned by Congress in the citizen suit provision "necessarily includes . . . plaintiffs seeking to enforce [the CWA] as private attorneys general").

[9] The Clean Air Act ("CAA") provision authorizes citizen suits for alleged violations of "an emission standard or limitation under [CAA] . . . [, defined in relevant part as an] emission limitation, standard of performance or

Id. at 3745. Thus, consistent with the statutory language, the legislative history of the citizen suit provision reflects Congress' intention to grant broad authority for citizen enforcement.

Ample case law supports our view that Congress intended to confer citizens standing to enforce water quality standards. Most notably, in PUD No. 1 of *Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900, 1910-14 (1994) (Jefferson County), the Supreme Court held that the Clean Water Act allows States to enforce the broad narrative criteria contained in water quality standards. In *Jefferson County*, a county which proposed to build an electricity-generating facility on a river challenged a minimum stream flow condition established by the State.[10] Although the county did not

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emission standard, . . . or any condition or requirement of a permit under . . . [sections of CAA] . . . or under an applicable [state] implementation plan." 42 U.S.C. § 7604(a), (f) (emphasis added).

[10] Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), authorizes the State to impose conditions for certification of a proposed project based upon several enumerated sections of the Clean Water Act. Although CWA § 303, 33 U.S.C. § 1313, is not one of the statutory provisions listed in CWA § 401(d), the Supreme Court concluded that States may condition § 401(d) certification upon compliance with § 303. The Court reasoned that because § 401(d) lists § 301 as a provision with which an applicant must comply, and § 301 in turn incorporates §

contest the State's authority to set limitations designed to ensure compliance with state water quality standards adopted under CWA § 303, the county argued that § 303 requires the mentation of "specific numerical criteria." *Id.* at 1910. The county contended that the State may not require it to operate the dam in a manner consistent with a "designated use," which is a qualitative requirement of the § 303 water quality standards. *Id.*

The Court rejected the county's argument, and held that the State may require a permit applicant to comply with the

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303 by reference, "state water quality standards adopted pursuant to§303 are among the 'other limitations' with which a State may ensure compliance through the§401 certification process." Jefferson County, 114 S. Ct. at 1909. Section 303 requires that any water quality standard adopted by the State "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C.§1313(c)(2).

The State issued a§401 water quality certification imposing a variety of conditions on the project, including a minimum stream-flow requirement of between 100 and 200 cubic feet per second. The State determined that construction and operation of the project as planned would interfere with one of the designated uses of the river, viz., salmonid migration, rearing, spawning, and harvesting, but that the minimum stream flow requirement would ensure compliance with the§303 water quality standards.

qualitative designated uses requirement. *Id.* The Court explained that under the literal terms of CWA § 303(c)(2), a water quality standard must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.* Thus, the Court concluded that a project that does not comply with a designated use of the water does not comply with the applicable water quality standards. *Id.* The Court also explained that CWA § 401(d), which provides for State certification of projects, explicitly authorizes "any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under . . . [CWA § 303] . . . and any other appropriate requirement of state law." *Id.*

By its holding, the Court expressly rejected the county's argument that designated use requirements are "too open-ended" to be enforceable and that the Clean Water Act only contemplates enforcement of the more "specific and objective" numerical criteria:

> [The county's] argument is belied by the open-ended nature of the criteria themselves . . . criteria are often expressed in broad, narrative terms. . . . In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)" need be rendered in numerical form. . . . [The county's] attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Id. at 1911 (emphasis added).

The county's losing argument in *Jefferson County* is very similar to the argument advanced by Portland in the instant case. Portland argues that citizens may not enforce the broad narrative conditions of state water quality standards, but may enforce only those conditions that have been translated into numeric effluent limitations.

We disagree with Portland's contention that *Jefferson County* is inapposite to the issue before us. Even though Jefferson County involved a state's authority to impose conditions under CWA § 401, whereas the present litigation involves citizen suit enforcement of CWA § 402 conditions, both the § 401 certification process and the § 402 permit process require applicants to comply with CWA § 301. As noted above, § 301 incorporates by reference the water quality requirements of § 303.

Moreover, although *Jefferson County* addressed the authority of States, not citizens, to enforce the narrative conditions of CWA § 303 water quality standards, nothing in that language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens from enforcing the same conditions of a certificate or permit that a State may enforce. To the contrary, as demonstrated above, these sources uniformly support broad citizen enforcement authority, including the authority to enforce water quality standards.

In addition to *Jefferson County*, numerous cases support a finding of citizen suit jurisdiction in this case. The Supreme Court has acknowledged citizen standing under CWA § 505(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and

state-established standards. *See E.P.A. v. California*, 426 U.S. 200, 224-25 (1976). By applying § 505(f)(6), several courts have hed that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations. In fact, permit conditions that courts commonly enforce under § 505(a) are not effluent limitations, but rather, requirements for retaining records of discharge sampling and for filing reports. *See e.g., Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) ("Simkins' reporting requirements are expressly made conditions of its permit, and therefore, violations of these conditions, by operation of § 1365 (f)(6) [CWA § 505(f)(6)], are violations of an effluent standard or limitation of § 1365(a)."), *cert. denied*, 491 U.S. 904 (1989). Other examples of enforceable permit conditions include conditions relating to sewage maintenance, *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), *aff'd*, 644 F.2d 995 (3rd Cir. 1981), and construction schedules, *Locust Lane v. Swatara Township Auth.*, 636 F. Supp. 534, 539 (M.D. Pa. 1986) (rejecting defendant's attempt "to impose a limitation on § 1365 where one is neither supported by the language nor the legislative history"). Finally, citizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the Clean Water Act, namely discharges that may never reach navigable waters. *Connecticut Fund For Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986).[11]

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[11] When this Court and other courts have he at citizens may not enforce water quality standards under § 505(a)(1), they addressed standards that were not included in

[8] Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole. Citizen suit enforcement of water quality standards is necessary to the effective enforcement of effluent limitations. Congress recognized that water quality standards "often cannot be translated into effluent limitations . . . ." 1972 U.S.C.C.A.N. at 3675. For example, certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids). *See* Or. Admin. R. 340-41-445(2)(f), (1), (k). Even after the 1972 amendments, states may adopt similar standards and express water quality criteria "as constituent concentrations, levels, or narrative statements . . . ." 40 C.F.R. 131.3(b) (1992).

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a NPDES permit. Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987) (suit to enforce water quality standards allegedly breached by nonpoint sources, which are never regulated by NPDES permits); McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988) (finding no citizen suit jurisdiction existed, because "a state water quality standard can constitute an effluent standard or limitation enforceable under section 505 only if it has been incorporated into an NPDES permit") Montgomery Envtl. Coalition Citizens Coordinating Comm. on Friendship Heights v. Washington Suburban Sanitary Comm'n, 607 F.2d 378, 381 (D.C. Cir. 1979).

Many discharges remain unregulated and primarily subject to water quality standards, despite statutory deadlines for achieving effluent limitations, 33 U.S.C. § 1311 (b)(1)(A) (1977 deadline for first-stage effluent limitations on all point source discharges), § 1311(b)(2) (West 1993 Supp.) (1989 deadline for second-stage, more stringent controls). Furthermore, in cases where effluent limitations do apply, they serve only as national, minimum requirements; states may adopt stricter, enforceable water quality standards and limitations. 33 U.S.C. § 1370.

By interpreting § 505 to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations, Portland would have us immunize the entire body of qualitative regulations from an important enforcement tool.[12] Such a result would be especially troubling in this case, because no effluent limitations cover the discharges from Portland's combined sewer overflows ("CSOs").[13]

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[12] Congress set deadlines for promulgation of effluent limitations, and therefore, must have anticipated a five-year lag, 1972-1977, before universal applicability of effluent limitations. However, nothing in the legislative history indicates that Congress intended to stall citizen enforcement of permit terms until promulgation of effluent limitations.

[13] Nor can citizens find consolation in their state court remedy of objecting to the contents of a permit within sixty days of its issuance, Or. Rev. Stat. 183, 484 (2). Citizens groups such as NWEA might not wish to dispute the issuance or contents of a permit, but to enforce the permit's

CSOs are the overflow points from combined sewage and stormwater collection systems. Because the number and volume of overflow events from CSO systems are caused primarily by uncontrollable events--i.e., the amount of stormwater entering the system--regulators have no ready way of determining what portion of the flow in a given discharge event is sewage and what portion is rainwater. Without this information, it is impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.

In *Jefferson County*, the Supreme Court recognized that the numerical criteria components of state water quality standards cannot reasonably be expected to address all the water quality issues arising from every activity which can affect the State's hundreds' of individual water bodies. 114 S. Ct. at 1912. The Court reasoned that requiring the States to enforce only the numerical criteria component of their water quality standards "would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses." *Id.* Accordingly, the Court stated that in the absence of "textual support for imposing this requirement," it was "loath to attribute to Congress an intent to impose this heavy regulatory burden on the States." *Id.*

Because the statutory language, legislative history, and case

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terms.

law authorize citizens to enforce permit conditions stated in terms of water quality standards, we hold that NWEA has standing to enforce the water quality standards contained in Portland's NPDES permit.

C. Procedural Determinations

In the court below, Portland asserted two other jurisdictional arguments upon which NWEA now seeks a determination. Portland argued that 1) the case was moot because of the changes in the 1991 permit; and 2) any action was barred under 33 U.S.C. § 1319(g)(6) by DEQ's subsequent enforcement actions.

Because NWEA claims entitlement to attorney's fees based on the alleged violations of the old permit, and seeks to enforce the water quality standards independently of the effluent limitations, a live and genuine controversy remains, so the case is not moot. With respect to the § 1319(g)(6) defense, the district court did not reach this question, having ruled against NWEA on other grounds. We therefore remand for a determination on this issue.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's holding that the 1984 permit covered the CSOs, and we REVERSE the district court's holding that CWA § 505(a) does not confer jurisdiction for citizen suits to enforce water quality standards when they are conditions of a CWA permit.

AFFIRMED in part, REVERSED in part, and

REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent from Part II-B of the opinion. I concur in Part II-A.

We decided this case and filed our opinion in 1993, at 11 F.3d 900. As the majority concedes in footnote 1, the full court voted on whether to go *en banc*, and decided against it. We are required by Federal Rule of Appellate Procedure 41(a) to issue our mandate seven days after entry of the order denying the petition for rehearing. I do not know why this was not done.

The only justification I can see for us to issue a new decision, contrary to our previous one and contrary to what we said in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F. 2d 842 (9th Cir. 1987), would be a Supreme Court decision to the contrary. When the Supreme Court makes a decision which renders a decision of ours erroneous, we sometimes recall a mandate and revise our disposition in light of the Supreme Court decision. The majority opinion suggests that PUD No. 1 of *Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994), has changed the law. If it did with respect to an issue dispositive of the case before us, I would not object to recalling our mandate to correct our error. But it does not.

The question before us is whether citizens' suits may be brought to enforce water quality standards, as opposed to

effluent limitations. *Jefferson County* says nothing about that. Basically, water quality standards say that a body of water should be no more polluted than the standard. Effluent limitations say that a particular discharger may discharge no more than the allowed quantity of pollutants. *Jefferson County* does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits. The question the court decided was whether "the state environmental agency, properly conditioned a permit for the project on the maintenance of specific stream flows to protect salmon and steelhead runs." *Id.* at 1905. The court decided that EPA's interpretation, "that activities, not merely discharges -- must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference." *Id.* at 1909.

If we were to try to tease something out of *Jefferson County* to assist our decision in this case, we would do better to focus on the Court's discussion of the appropriate use of water quality standards, which is to generate limitations for specific activities. Here is the Court's discussion of the distinction between water quality standards and effluent limitations:

> Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the River as a fishery, must be translated into specific limitations for individual projects.

Id. at 1911 (emphasis added); *see also id.* at 1910 ("States may condition certification upon any limitations necessary to ensure compliance with state water quality standards."

(emphasis added)).

We have said that only permit limitations derived from water quality standards, not water quality standards themselves, are enforceable by citizens' suits. *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F. 2d 842 (9th Cir. 1987).

> Thus, effluent limitations may be derived from water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the "limitations necessary to meet" those standards, or "required to implement" the standards.

Id. at 850 (emphasis added).

While our statement in *Oregon Natural Resources Council* may be dictum as applied to the case at bar, I do not see a good reason for deciding the case at bar inconsistently with what we said in *Oregon Natural Resources Council*. The Supreme Court has now analyzed the difference between water quality standards and effluent limitations along the same lines in *Jefferson County*. Judge Ingram's earlier opinion in the case at bar pointed out that "the authorities generally reject citizen suit standing to enforce water quality standards," and appellants "have not been able to find a single case in which a court held that citizens' suits could be used to enforce water quality standards." *Northwest Environmental*, 11 F.3d at 907.

The majority reasons that 33 U.S.C. § 1365 allows

citizens' suits for violation of "an effluent standard," and defines "effluent standard" as "a permit or condition thereof," and Portland's permit, in addition to detailed effluent limitations, requires that no wastes be discharged which would violate water quality standards. This reasoning has force, and I am troubled by the difficulty of applying *Oregon Natural Resources Council* in the face of this logical, literal construction.

Nevertheless, we previously concluded on the basis of analysis of several additional provisions of the statute that it is not the permittee who must comply with the water quality standards, but rather the issuing authority, which has a "duty . . . to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met." *Northwest Environmental*, 11 F.3d at 908. That makes sense in light of what the Supreme Court said in *Jefferson County*. Congress meant for the issuing authority to decide upon end-of-pipe effluent standards for the permit, which it could derive from water quality standards, when Congress allowed citizens' suits to enforce permit limitations. It did not mean for citizens' suits to proceed on the basis of permit violations, where the permittee complied with end-of-pipe discharge limitations but the water still wound up being too polluted. A water quality standard should be deemed to be not among those authorized by the statute for purposes of citizen suit enforcement.

The City of Portland persuasively argues that, if the water quality standard were used as a basis for punishing sewage overflows during rainy weather, then the detailed end-of-pipe discharge limitations in the permit designed for this

precise problem would have no practical effect. The City provided evidence that the actual intent of the permit issuing authority and the City of Portland was that the water quality standards language was put in for pollutants other than the ones, such as the sewage overflows in rainy weather, known about when the permit was issued. This reading would be consistent with the general principle of treating the specific as overcoming the general. *See Karrell v. US*, 181 F. 2d 981 (9th Cir. 1950) (specific provision governs even though general provisions, if standing alone, would include the same subject); *International Ass'n of Machinists & Aerospace Workers v. Boeing*, 833 F.2d 165, 169 (9th Cir. 1987) (same). We should follow the City's persuasive construction of the permit.

The majority's argument from legislative history and policy seems to me to have no force. The history shows that because of the ineffectiveness of water quality standards as pollution limiting device, Congress decided to change the enforcement mechanism to effluent limitations. *See Northwest Environmental*, 11 F.3d at 909-11.

The majority argues that as a matter of policy, Congress meant to prevent pollution, and citizens' suits add power to anti-pollution enforcement mechanisms, so there is no reason to deny citizens' suits enforcement. The first two propositions do not imply the third. There can be too much of a good thing. *See, e.g.*, on other subjects, *United States ex rel. Miller v. Greer*, 789 F.2d 438, 451-52 (7th Cir. 1986) (Easterbrook, J., dissenting); *National Labor Relations Bd. v. Walton Manufacturing Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting). There is too much of a good thing when its value is exceeded by the

value of other good things available for the same or less cost.

Water quality standards are a useful device for government enforcement authorities (who decided not to prosecute this case against the City of Portland), because they provide standards for effluent limitations and goals toward which enforcement should be aimed. They are too uncertain and amorphous, however, for use against specific polluters. Suppose, hypothetically, that water quality standard allows for 100 units of a pollutant, upstream and non-point source polluters discharge 50 units, and the downstream discharger is permitted to discharge 50 units. If the upstream and non-point source polluters increase their discharge to 80 units, it does not automatically follow that the downstream discharger should be limited to 20. The burdens of so severe a limitation may exceed the burdens of the extra pollution, or enforcement efforts might more appropriately be directed at the other polluters. In the case at bar, the majority concedes that the social costs of filling the streets and basements of Portland with sewage, or spending between a half billion and $1.2 billion dollars on renovation, are the practical alternatives to tolerating violations of the water quality standards. *See* Majority Opinion at I-A, II-A. A public authority might rationally decide that filling the streets and basements with sewage is worse than polluting the river with it, and that the citizens of Portland need several years to raise and spend the money necessary to avoid running the sewage into the streets, the basements, and the river.

The reason that this case has not been rendered moot by subsequent changes in the permit which eliminated the basis

for the claims is NWEA's claim for attorneys' fees and possibly civil penalties. If the private advocacy group which brought this action prevails on the claim that the City should have done something more than it did under its now-obsolete permit, then it will obtain a great deal of money from the citizens of Portland. This incentive is why citizens' suits may produce to much of a good thing with regard to enforcement.

Suppose, hypothetically, we authorized citizens' suits to enforce highway speed limits. We can all agree that excessive speeds on the highways are undesirable, and that highway patrol officers are too few to ticket all the drivers who speed. We would get more prosecution, and more court cases, then the prudent exercise of discretion would justify. A police officer might exercise discretion not to ticket drivers less than 10 miles per hour over the limit, because the increased danger was negligible, and the enforcement burden to the officer and the courts great. The officer might, however, ticket a speeder with a makeshift towing rig which looked dangerous. The officer and the judge would be pleased to have only one ticket, not hundreds, to dispose of, and the enforcement expense would be small relative to the reduction in danger. A "public interest advocacy group," however, would have an incentive to ticket all the automobiles going a few miles per hour over the limit, because the private group, unlike the police officer and the judge, would have a financial incentive to enforce against the large number of minor violators, even though the burdens of enforcement would be very high relative to the improvement in public safety. A zealous concern for safety on the highways would

doubtless contribute to doing well by doing good, but there would be too much good done.

In the case at bar, all the precedents indicate that citizens' suits are not allowable for violations of water quality standards, where those standards are not translated by the permit into effluent limitations. There is no good reason for avoiding application of precedent, and creating new law which allows citizens' suits for purposes of obtaining attorneys' fees and penalties for past violations of water quality standards. We should have left our previous decision alone.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES A Non-Profit Oregon Corporation, and NINA BELL, Plaintiffs-Appellant, vs. CITY OF PORTLAND, Defendant-Appellee.	)	No. 92-35044 D.C. No. CV-91-339-PA ORDER

Filed January 24, 1996

Before:Pregerson, Kleinfeld, Circuit Judges, and INGRAM, District Judge.*
Dissent by Judge O'Scannlain.

Judges Pregerson and Ingram voted to deny appellee's amended petition for rehearing. Judge Pregerson voted to reject the suggestion for rehearing en banc and Judge Ingram so recommended.
Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.
The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehearing the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.
The amended petition for rehearing is denied and the

suggestion for rehearing en banc is rejected.

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*The Honorable William Ingram, United States Senior District Judge for the Northern District of California, sitting by designation.

Northwest Environmental Advocates v. City of Portland, No. 92-35044

O'SCANNLAIN,
Circuit Judge, joined by HALL, T.G. NELSON, and KLEINFELD, Circuit Judges, dissenting from order rejecting suggestion for rehearing en banc.

By failing to rehear this case en banc, we have significantly reshaped federal environmental law, without consent of Congress, to the curious end that any citizen will now be permitted to bring a lawsuit at government expense for the enforcement of state water quality standards that have not been translated into effluent limitations in federal permits. Such unwarranted expansion of citizen standing conflicts with the plain language of the Clean Water Act and with prior decision of this circuit and others.

It should go without saying that the environment faces real and growing dangers that warrant protective measures and challenge us to develop innovative solutions. Nevertheless, by allowing citizens to enforce standards that Congress specifically allocated to government agencies to monitor, the court has upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law. The result promises to invite excessive, costly, and counterproductive citizen suits,

funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected.

The Clean Water Act allows citizens to enforce effluent limitations contained in federal permits, but the Act does not permit citizens to enforce general water quality provisions. 33 U.S.C. § 1365. There is more than a technical distinction involved; there are significant consequences at stake. Water quality standards address the level of pollutants found in a body of water, while effluent limitations focus on the level of pollutants in the effluent discharged into a body of water by a particular discharger. As Judge Kleinfeld notes in his well-articulated dissent, "[w]ater quality standards are a useful device for government enforcement authorities . . . because they provide standards for effluent limitations [but water quality standards] are too uncertain and amorphous . . . for use against specific polluters." *Northwest Environmental Advocates v. Portland*, 56 F.3d 979, 992 (9th Cir. 1995) (Kleinfeld, J., dissenting) ("*NWEA II*"). While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizen suits against permittees who are meeting the specific requirements (i.e. effluent limitations) outlined in their permits.

In its original opinion released more than two years ago, the same panel, writing for the court, held the exact opposite of what it now holds. There, the then-majority opined that citizens do *not* have a private right of action to enforce water quality standards contained in Portland's

permit because such standards do not constitute an "effluent standard or limitation" under 33 U.S.C. § 1365(a) and (f) and ruled for the City of Portland. *Northwest Environmental Advocates v. Portland*, 11 F.3d 900 (9th Cir. 1993) ("*NWEA I*"). Judge Pregerson dissented. The citizen plaintiffs then filed a suggestion for rehearing en banc which failed to receive a majority of votes of the active judges of the full court. On April 25, 1994, the panel resumed control of the case. Instead, however, of entering the order denying the petition for rehearing and rejecting the suggestion for rehearing en banc, and thereby allowing the mandate to issue seven days later under FRAP 41(a), the panel held on to the case and reconsidered its holding in light of *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, __ U.S. ___, 114 S. Ct. 1900 (1994) ("*Jefferson County*"), which the Supreme Court decided on month *after* rejection of the en banc call in *NWEA I*. Relying on *Jefferson County*, the panel developed a new majority and thereupon vacated its original opinion and substituted a new one holding that citizens indeed *do* have standing under the Clean Water Act to enforce water quality standards. *NWEA II*, 56 F.3d 979, filed June 7, 1995.

In my view, the panel erred by reversing its original position, because *Jefferson County* simply does not support such reversal and the panel's new holding conflicts not only with a prior decision of our own court, but also with the law of other circuits. The court now cites *Jefferson County* in support of the view that Congress intended to confer standing on citizens to enforce water quality standards. *NWEA II*, 56 F.3d at 987. However, as the majority eventually acknowledges, *id.*, at 988, and as the dissent

emphasizes, *Jefferson County* has nothing to do with citizens' standing. *Id.* at 990 (Kleinfeld, J., dissenting) ("*Jefferson County* does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits.").

Instead of addressing citizen standing to enforce a permit condition, *Jefferson County* concerns a local utility district's appeal of a stream flow condition imposed by the state as part of the state's certification of the district's application for a federal permit to build a hydroelectric power plant. ___ U.S. ___, 114 S. Ct. at 1907-08. The Supreme Court held that "States may condition certification [of projects] upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law,'" and that the minimum flow condition imposed by Washington was an appropriate requirement of state law. *Id.* at ___, 114 S. Ct. at 1910. This holding merely indicates that states may impose certain water quality requirements as conditions for granting the state certification that must be obtained by an applicant seeking a federal permit. *In no way* does this holding support the notion that citizens have a private right of action to challenge permit conditions that have not been translated into effluent limitations.

Section 505 of the Clean Water Act authorizes federal jurisdiction over citizen suits "(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a)(1). In defining "effluent standard or limitation," the section refers to various discharge-related limitations that may be imposed by other sections of the Act or by a

federal permit. 33 U.S.C. § 1365(f); *see* 33 U.S.C. § 1365(f)(G) ("effluent standard or limitation" means "a permit or condition thereof"); *Jefferson County*, __ U.S. __, 114 S. Ct. at 1915, 1916-17 (Thomas, J., dissenting) (describing discharge-related limitations in the Act).

Since the citizen-plaintiffs in this litigation allege violations, not of effluent limitations, but rather of a state water quality provision contained in Portland's permit, the citizens fail to meet the Clean Water Act's requirements for citizen standing. By holding otherwise, *NWEA II* conflicts with our decision in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) ("*ONRC*"), in which we stated that citizens may file suit to enforce permit limitations derived from water quality standards, but not water quality standards themselves. *Id.* at 850 ("[E]ffluent limitations may be derived from state water quality standards and may be enforced when included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable. . . .").

Granted, *ONRC* involved citizens attempting to enforce state water quality standards under 33 U.S.C. § 1311(b)(1)(C), as opposed to state water quality standards contained in a permit. However, the court's conclusion that the Clean Water Act forbids citizens from suing to enforce water quality standards under section 1311(b)(1)(C) may logically be extended to suits by citizens to enforce water quality standards in permits. *See NWEA I*, 11 F.3d at 907 (citing authorities indicating that "whenever courts have been faced with the question, the answer has been that

citizen suits cannot be used to enforce water quality standards").

As the same panel declared in *NWEA I*, "[The plaintiffs] have not been able to find a single case in which a court held that citizen suits could be used to enforce water quality standards, whether the water quality standards were incorporated in a NPDES [National Pollution Discharge Elimination System] permit or not." *Id.* at 907-08; *see also id.* at 909-11 (outlining legislative history supporting conclusion that citizens lack standing to enforce water quality standards that have not been translated into effluent limitations).

No other circuit has recognized a right of citizens to sue for the enforcement of state water quality standards contained in permits. In fact, other circuits have explicitly and implicitly ruled out such suits. *See Save Our Community v. United States Environmental Protection Agency*, 971 F.2d 1155, 1162 (5th Cir. 1992) ("Without the violation of either (1) an effluent standard or limitation under the CWA, or (2) an order issued with respect to these standards and limitations, the district court lacks jurisdiction to act [in a citizen suit]."); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 979 (2d Cir. 1984) ("'[a]uthority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established administratively under the Act'" (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747)).

Furthermore, the holding in *NWEA II* directly conflicts with the Second Circuit's decision in *Atlantic State Legal*

Foundation v. Eastman Kodak, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, ___, U.S. ___, 115 S. Ct. 62 (1994). In *Atlantic States*, the Second Circuit held that "state regulations, including the provisions of SPDES [State Pollutant Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required' by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365." *Id.* at 359 (citation omitted). In addition, the court noted:

> States may enact stricter standards for wastewater effluents than mandated by the CWA and federal EPA regulations. 33 U.S.C. § 1342(b). These states' standards may be enforced under the CWA by the states or the EPA, 33 U.S.C. § 1342(h), but private citizens have no standing to do so.

Id. at 358.

In short, *NWEA II,* contradicts the plain language of the Clean Water Act, conflicts with a prior decision of this circuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue. The decision establishes a citizens' cause of action that Congress never intended and that no other circuit has felt compelled to recognize.

Failure to rehear this case en banc is a most unfortunate and unsettling misstep in the orderly development of federal environmental law. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES, an Oregon non-profit corporation, and NINA BELL, individually,	) CV No. 91-339-PA
Plaintiffs,	) AMENDED OPINION
v.	)
CITY OF PORTLAND,	)
Defendant.	)

January 8, 1992

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PANNER, J.

Plaintiffs Northwest Environmental Advocates (NWEA) and Nina Bell, NWEA's Executive Director, bring this action against defendant City of Portland under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. Plaintiffs seek to end defendant's discharge of raw sewage and other wastes into the Willamette River and the Columbia Slough, a tributary of the Willamette.

Pursuant to the parties' stipulation, I considered all materials filed in support of defendant's motion to dismiss and motion for summary judgment, and plaintiffs' cross motion for partial summary judgment, as submissions for a court trial on liability only with final argument on November 25, 1991. Having considered all such materials and the arguments presented, I find for defendant. These are my findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

The City's sewer system is antiquated. The majority of the system is a "combined sewer," carrying both sanitary waste and storm runoff. Sanitary waste is untreated raw sewage. Because it carries storm runoff, volume carried by the sewer system increases when it rains. Before 1947, the combined sewers dumped all flow directly into the Willamette River and the Columbia Slough.

In 1947 defendant began building interceptors in the sewer lines. The interceptors are designed to divert the sewer flow from entering the waterways and pipe the waste to a

sewage treatment plant. The treated effluent from that facility is then discharged into the Columbia River. This is how the system operates today.

The interceptors, however, do not have unlimited capacity. They were designed to divert, or "intercept," three times the average dry weather flow. They can carry the anticipated flow of sanitary sewage, plus the storm water runoff from light rain storms.

Today, when more storm runoff and sewage flows through the system than the interceptors and the treatment plant can handle, the pipes that formerly discharged directly into the Willamette River and the Columbia Slough, do exactly that: discharge the excess flow directly into those bodies of water, without treatment. The actual discharge from these points, and sometimes the pipe themselves, are called "combined sewer overflows" or CSOs.

The CWA establishes the National Pollutant Discharge Elimination System (NPDES), under which permits for discharges into navigable waters are issued by the Administrator of the Environmental Protection Agency (EPA). The permit system may also be administered by a state if the state program is approved by the EPA Administrator. 33 U.S.C. § 1342(b).

Oregon's federally approved NPDES program is administered by the Department of Environmental Quality (DEQ) and DEQ's parent commission, the Environmental Quality Commission (EQC). NPDES permits are issued for five-year periods. DEQ issued NPDES permits to defendant for defendant's sewer system in 1974, 1979, and

1984. A major issue in this case is whether the 1984 permit covered the CSO discharges. As discussed below, I find that the 1984 permit did cover the discharges.

The 1984 permit was due to expire in July 1989. It stayed in effect after that date during the renewal process. Or. Admin. R. 340-14-030. In December 1990, DEQ provided defendant with a preliminary draft permit which incorporated some CSO requirements that EPA had issued in a September 1989 "National Combined Sewer Overflow Control Strategy." DEQ required defendant to complete a facilities plan and time schedules for elimination of CSOs.

Defendant maintained that it could not eliminate the CSOs during the period of the next five-year permit. Defendant and DEQ began discussing the use of a compliance order outside of the permit to provide a longer than five-year schedule for elimination of the CSOs. In August 1991, DEQ issued defendant a renewed NPDES permit for its sewer system. Simultaneously, the EQC approved a Stipulation and Final Order (SFO) addressing defendant's CSOs.

The SFO requires defendant to develop a plan and institute significant changes in its sewer system. Defendant must have a final facilities plan in 1994. The plan must be designed to attain compliance with applicable water quality standards at all CSOs either by December 1, 2006 or December 1, 2011.

CONCLUSIONS OF LAW

Plaintiffs raise two causes of action: (1) they allege that

defendant has violated the CWA by discharging pollutants into navigable waters through the CSOs without an NPDES permit, (the permit claim); and (2) that defendant violated the CWA by violating state water quality standards in the receiving waters, (the water quality claim).

Plaintiffs seek: (1) a declaration that defendant is in violation of the CWA; (2) an injunction setting a date for full compliance with the CWA and establishing a comprehensive schedule with "milestones adequate to ensure that the ultimate goal is met;" (3) civil penalties; and (4) attorney's fees.

I. Permit Claim

A. Injunctive Relief

Plaintiffs filed suite in March 1991, before the August 1991 renewal of the NPDES permit and the issuance of the SFO. Defendant argues that the request for injunctive relief under this claim is moot because it now discharges waste from the CSOs under a valid NPDES permit.

Plaintiffs concede that the CSOs are covered by the 1991 permit. Thus, the claim for injunctive relief insofar as it seeks to have the CSO discharges covered by a current permit, is moot.

Nonetheless, plaintiffs maintain that their request for injunctive relief on this claim is not completely moot. They contend that a mootness defense is available to defendant regarding injunctive relief only when actual corrective action has been taken to abate the underlying

behavior so that it could not reasonably be expected to recur. Because, plaintiffs maintain, the SFO's corrective action will take twenty years, defendant cannot prove that the discharges will not recur.

I agree with defendant. The CSOs are covered by the 1991 permit. The permit has been approved by DEQ and EPA. The corrective action is the SFO. The fact that it will take twenty years is regrettable. However, that is the course of action approved by DEQ. There simply is no present permit violation upon which to fashion injunctive relief.

B. Civil Penalties

Defendant argues that if the injunctive relief request is moot, the civil penalty portion of the permit claim is also moot. Alternatively, defendant argues that plaintiffs are barred from seeking civil penalties because the state commenced an enforcement action regarding the CSOs before plaintiffs initiated this suit, the state is diligently prosecuting the action, and the prosecution is occurring under a state law comparable to the federal penalty scheme found in section 309(g) of the CWA. 33 U.S.C. § 1319(g)(6).

I need not consider these arguments. Even if the request for civil penalties is not moot and section 1319(g)(6) does not bar plaintiffs' claim for penalties, defendant's NPDES permits cover the CSO discharges. There have been no unpermitted CSO discharges.

A five-year statute of limitations period applies to citizen enforcement actions under the CWA. *Sierra Club v.*

Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987). At issue here is the validity of the 1984 permit only. Nonetheless, language from the two earlier permits is relevant.

The 1974 permit allowed the discharge of treated effluent into the Columbia River from the treatment plant. Eimstad Aff., Exh. A at 1. It also separately stated:

> S6. The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at all diversion structures. Discharge at overflow points 003 through 066 is permitted when the flow at diversion structures exceeds three times the dry weather flow. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable to coincide with the water recreation season (June 1 to October 31 of each year) and in accordance with the infiltration-inflow plan adopted under Condition S2.

Id. at 2. Overflow points 003 - 066 are the CSOs. The 1979 permit, after identifying one outfall from the treatment plant as the only "source covered by this permit," contained language similar to the quoted passage from the 1974 permit. *Id.*, Exh. B at 2.

The 1984 permit listed two outlets from the treatment plant as "sources covered by this permit." *Id.*, Exh. C at 1. Unlike the previous two permits, the 1984 permit never referenced any other outfall numbers. Thus, the CSOs were not specifically identified in the permit. The 1984 permit did, however, without mentioning the specific outfall numbers, contain a passage similar to that in the 1974 and 1979 permits:

> 4. The permittee shall provide interception of at least three times the dry weather flow before discharge shall occur at any diversion structure. The overflow from these diversion structures shall be minimized and/or eliminated as much as practicable during the water recreation season (June 1 to October 31).

Id. at 2. The difference between the 1974 and 1979 permits on the one hand and the 1984 permit on the other is that the older permits specifically cited outfalls 003 - 066 amidst this nearly identical language.

Defendant argues that the 1984 permit covered the CSO discharges. Defendant acknowledges that the 1984 permit did not, as did the previous permits, reference the CSOs by outfall number. Defendant contends that the prior permits show that DEQ knew what diversion structures were, where they were, and how they worked when the 1984 permit was issued. When the 1984 permit is examined in light of the older permits, defendant maintains it is apparent that the 1984 permit simply used a shorthand method of referring to the same discharges.

Defendant further relies on the affidavit of Harold Sawyer, former Water Quality Division Administrator for DEQ. Sawyer oversaw Oregon's NPDES permit program until 1986. He states that Portland's entire sewer system, including CSO outfalls, was permitted by Portland's 1984 NPDES permit and by its prior NPDES permits. Sawyer Aff. at 2. He also states that combined sewer overflows that occurred after interception of three times dry weather flow were not considered to be violations of Portland's

1984 NPDES permit or any of its prior NPDES permits. *Id.*

Additionally, the final SFO states that:

> [Defendant's] prior NPDES permit, issued on September 18, 1984, did not expressly identify the combined sewer overflow discharge points that are part of the sewer system. Prior to the development of the [DEQ's] final draft "Oregon Strategy for Regulating Combined Sewer Overflows (CSOs)" on February 28, 1991, as a matter of policy the [DEQ] did not always list CSO discharge points in an NPDES permit but, in many instances, issued permits for an entire sewer system. EPA's Region 10 office approved the issuance of such permits. [Defendant's] 1984 NPDES permit is a permit for the sewer system, which includes CSO outfalls, but did not contain specific effluent limitations for CSOs.

Eimstad Aff., Exh. H at 2-3. Defendant argues that this demonstrates DEQ's intent that the 1984 permit covered the CSOs. Plaintiffs argue that because the CSOs were not listed under the "sources covered by this permit" section of the 1984 permit, that the plain language covered only the two outfalls from the treatment plant. Plaintiffs maintain that the subsequent permit language regarding diversion structures and the prohibited flow below three times the dry weather flow, should not override the clear language on the face of the permit setting for the sources covered by the permit.

Plaintiffs also argue that the fact that the 1984 permit purported to cover defendant's entire sewer system does not

mean that it covered the CSOs. Plaintiffs rely on *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 592 (D.C. Cir. 1980) for the proposition that CSOs are not considered part of a "treatment works." "Treatment works" refers to a device or system used in the treatment of sewage or wastes. *Id.* at 590 n. 17. It includes sewers, pipes, etc. only if they convey wastewater to a treatment plant. *Id.* The problem with plaintiffs' argument then, is that a sewer system that has CSOs, which do not convey wastewater to a treatment plant, is broader than a "treatment works." Thus, the fact that CSOs are not considered part of a "treatment works," does not mean that they are not part of a sewer system covered by an NPDES permit.

Plaintiffs rely on two documents suggesting that the 1984 permit did not cover the CSOs. First, they cite a February 1988 letter written by defendant's Bureau of Environmental Service's Chief Engineer W.C. Gaffi in which he states, in part:

> The City supports ODEQ's position to permit the CSO outfalls through a modification to the existing treatment plant permit. This approach should achieve the same goal as individual CSO permits and reduce the administrative cost of doing so.

Parenteau Decl., Exh. 16. According to plaintiffs, if the 1984 permit covered the CSOs, there would have been no need to state that they should be permitted through a modification to the "existing treatment plant permit."

Plaintiffs also rely on a February 1991 document entitled

"Oregon's Strategy for Regulating Combined Sewer Overflows (CSOs)," written by DEQ in response to EPA's National Combined Sewer Overflow Strategy. It states in part:

> 1. The City of Portland: 12 CSOs to the Columbia Slough and 43 to the Willamette River. None of these outfalls are covered by a permit, however, all are proposed to be addressed in the Portland - Columbia Blvd STP permit renewal.

Parenteau Decl., Exh. 13 at 5. Plaintiffs rely on this language to argue that the CSOs were not covered by the 1984 permit.

To refute this argument, defendant submits the affidavit of Barbara Burton, the author of the Oregon strategy document. She states that the language "none of these outfalls are covered by a permit" meant only that the CSOs were not individually listed and assigned effluent limitations. Burton Affidavit at 2. Her understanding was that the 1984 permit was for the entire sewer system including the CSOs. *Id.*

Plaintiffs' strongest argument rests with Gaffi's letter. A fair reading of the letter suggests that at least Gaffi himself did not view the 1984 permit as covering the CSOs. Nonetheless, I agree with defendant that the 1984 permit covered the CSOs.

First, the permit covered the entire sewer system which, as explained above, includes the CSOs. Additionally, to construe the permit as plaintiffs suggest would render the

language limiting the discharges in summer and prohibiting discharges of less than three times the average the dry weather flow, entirely meaningless. It is obvious from the 1974 and 1979 permits that this language was meant to address CSO discharges. I am also persuaded by Sawyer's affidavit as well as Burton's explanation that "none of these outfalls are covered by a permit" meant only that none of the CSOs was covered by an *individual* permit.

Gaffi's letter, though capable of suggesting that the permit did not cover the discharges, is not persuasive enough in the face of the common sense reading of the permit, which when examined in context with the older permits and when construed to give the language limiting discharges meaning, directs a conclusion that the 1984 permit covered the CSO discharges.

II. The Water Quality Claim

In this claim, plaintiffs argue first that defendant violated the CWA because the unpermitted CSO discharges violated Oregon water quality standards. Alternatively, plaintiffs maintain that even if the CSOs were discharging pursuant to the 1984 permit, defendant violated the permit conditions because the permit itself required compliance with Oregon water quality standards. Because the 1984 permit covered the CSO discharges, I need only consider plaintiffs' alternative argument.

The CWA authorizes citizen suits "(1) against any person . . . who is alleged to be in violation of (A) an *effluent standard or limitation under this chapter*. . . ." 33 U.S.C. § 1365(a)(1) (emphasis added). According to defendant,

plaintiffs cannot maintain their water quality claim because water quality standards do not equal "effluent standards or limitations under this chapter."

Generally, the term "effluent limitation" means "any restriction established by a State . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, ..." 33 U.S.C. § 1362(11). The Ninth Circuit has described water quality standards as follows:

> States establish water quality standards that specify the uses to be made of a body of water and the maximum levels of pollutants allowable in view of those uses. Water quality standards are designed to ensure the survival of wildlife in navigable waters and to protect recreational activities in and on the water. 33 U.S.C. § 1312(a). . . . [W]ater quality-based limitations relate to the environmental effects of different effluent levels.

Sierra Club v. Union Oil Co. of Calif., 813 F.2d 1480, 1489 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988).

As described by the Second Circuit in a case discussing the EPA's approval of state water quality standards were the "keystone of the federal pollution control program" prior to the 1972 enactment of amendments to the Federal Water Pollution Control Act (now known as the Clean Water Act). *Bethlehem Steel v. Environmental Protection Agency*, 538 F.2d 513, 515 (2d Cir. 1976). "If wastes discharged into receiving waters reduced the quality below permissible

standards, legal action could be commenced against the discharger." *Id.* (citation omitted).

Dissatisfaction with the water quality standards as a method of adequate pollution control enforcement led to their replacement with "effluent limitations." *Id.* "Instead of *indirectly* measuring discharges by their effect on water quality, monitoring equipment would *directly* measure discharges at their source." *Id.* (citation omitted)(emphasis in original). The court noted that although water quality standards and effluent limitations are related, they are entirely different concepts. *Id.*

The 1984 permit provided that "[n]otwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards as adopted in [Oregon Administrative Rule 340-41-445]. . . ." Eimstad Aff., Exh. C at 2.

Plaintiffs argue that they may maintain a suit for water quality violations pursuant to 33 U.S.C. § 1365(f)(6), defining section 1365(a)(1)'s "effluent limitation or standard under this chapter" as a violation of an NPDES "permit or condition thereof." Because, plaintiffs argue, the prohibition on violating water quality standards is a condition of the 1984 permit, defendant may be sued for violations of that condition under section 1365(a)(1).

In 1988, the Eastern District of California held that "a state water quality standard can constitute an effluent standard or limitation enforceable under [section 1365(a)(1)] only if it has been incorporated into an NPDES permit." *McClellan*

Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1200 (E.D. Cal. 1988). Given the distinction between effluent limitations and water quality standards discussed above, and the problems with analyzing violations of water quality standards as opposed to effluent limitations, this holding is best interpreted to mean that state water quality standards can constitute effluent standards, violations of which may be actionable in a citizen suit, only if they are incorporated into an NPDES permit through effluent limitations.

Here, though the 1984 permit referred to state water quality standards, those standards were not incorporated in the permit through any effluent limitations on the CSOs. Contrary to plaintiffs' assertions, the lack of effluent limitations in the permit did not leave plaintiffs without a remedy. They could have challenged the sufficiency of the permit through the appropriate channel - an action filed in state court. *See* 33 U.S.C. § 1365(a)(1) (no basis for citizen suits to challenge state issued NPDES permits in federal court).

I agree with defendant that the mere reference to water quality standards in a permit does not make them "effluent standards or limitations" for purposes of sections 1365(a)(1) and (f). I also agree with defendant that plaintiffs' argument is nonsensical in that, according to plaintiffs, the 1984 permit allowed the CSO discharges but simultaneously rendered each discharge a violation of the permit through violations of water quality standards. It is extremely unlikely that DEQ would have put defendant in such an impossible position.

CONCLUSION

I find for defendant on plaintiffs' first and second causes of action.
DATED this 8th day of January, 1992.

/s/
OWEN M. PANNER
United Stated District Judge

(2)

95-1732

No. _____

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI and APPENDIX Volume II

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April 23, 1996

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UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26--WATER POLLUTION
PREVENTION AND CONTROL
CHAPTER III--STANDARDS AND ENFORCEMENT
Current through P.L. 104-28, approved 9-6-95

Sec. **1311.** Effluent limitations
(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
(b) Timetable for achievement of objectives
In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent

limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of

subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, Sec. 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall

require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable
The Administrator may modify the requirements of

subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations
Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations
Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste
Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants
(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications
A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or

synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification
If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants
(A) General authority
Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing
(i) Sufficient information
The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination
The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant
If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination
If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions
A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition
A decision to add a pollutant to the list of pollutants for

which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof
The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants
The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements
The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--
(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;
(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which

assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;
(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;
(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;
(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;
(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;
(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;
(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to

be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions
(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the

time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or

if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures
(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or

received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)
(A) Effect of filing

An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval
Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision
An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(5) Extension of application deadline
(A) In general
In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modification pursuant to subsection (h) of this section of the requirements of subsection (b)(1)(B) of this section with respect to biological oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application
An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions
The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline
The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology
In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by

the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants
Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources
(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and

(b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that--
(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance

with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of

the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors
(1) General rule
The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in

establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--
(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a nonwater quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications
An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision
The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information
The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications
For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application
An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial
If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the

Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports
Every 6 months after February 4, 1987, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under this section or section 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees
The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations
(1) In general
Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has

an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations
The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions
For purposes of this subsection--
(A) Coal remining operation
The term "coal remining operation" means a coal mining

operation which begins after February 4, 1987, at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) Remined area
The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) Pre-existing discharge
The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws
Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. Sec. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

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CHAPTER 26--WATER POLLUTION
PREVENTION AND CONTROL
SUBCHAPTER III-STANDARDS AND ENFORCEMENT

Current through P.L. 104-28, approved 9-6-95

Sec. 1312. Water quality related effluent limitations
(a) Establishment
Whenever, in the judgment of the Administrator or as identified under section 1314(1) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations
(1) Notice and hearing
Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this section toward the requirements of subsection (a) of this section.

(C) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

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Sec. 1313. Water quality standards and implementation plans

(a) Existing water quality standards
(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18,

1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of

notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations
(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section,

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standard; publication
(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review

shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this

section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety

which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify

such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations
(A) Standard not attained
For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained
For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process
(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which

will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable areawide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance
Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards
Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards
For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

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Sec. 1319. Enforcement
(a) State enforcement; compliance orders
(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the

Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person--

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a

violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary

for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties
(1) Negligent violations
Any person who--
(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations
Any person who--

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment
(A) General rule
Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing

any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions
For the purpose of subparagraph (A) of this paragraph--
(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant; except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent; and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate

any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset
For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"
For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined
For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. Sec. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. Sec. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the

Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title, [FN1] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any

judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatment works Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties
(1) Violations
Whenever on the basis of any information available--

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties
(A) Class I
The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the

proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II
The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount
In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order
An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order
(A) Limitation on actions under other sections
Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits
The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not

apply with respect to any violation for which--
(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance
No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review
Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment--

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia

Circuit or for any other circuit in which such person resides or transacts business, by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection
If any person fails to pay an assessment of a civil penalty--
(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be, the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a

timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas
The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures
Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26--WATER POLLUTION
PREVENTION AND CONTROL
SUBCHAPTER IV--PERMITS AND LICENSES
Current through P.L. 104-28, approved 9-6-95

Sec. 1342. National pollutant discharge elimination system
(a) Permits for discharge of pollutants
(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs
At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--
(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent

to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a

reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals
A State may return to the Administrator administration, [FN1] and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator
(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days

of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement
In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such

category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants
Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works
In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program

has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited
Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information
A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits
Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been

made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement
(1) Agricultural return flows
The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations
The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished

product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage
A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs
The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs
The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the

remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition
In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions
A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if--

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), (g), (h), (i), (k), (n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a

decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges
(1) General rule
Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions
Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers--

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements
(A) Industrial and large municipal discharges
Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges
Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies
The Administrator, in consultation with the States, shall conduct a study for the purposes of--

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations
Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

UNITED STATES CODE ANNOTATED
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26--WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V--GENERAL PROVISIONS

Current through P.L. 104-28, approved 9-6-95

Sec. 1365. Citizen suits
(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice
No action may be commenced--
(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected
(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation
For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) Citizen
For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the pubic health or welfare in his State, or is causing a violation of any water quality requirement in his State.

United States Environmental Protection Agency
Washington, D.C. 20460
July 1, 1994

Memorandum

SUBJECT: Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits

FROM: Robert Perciasepe
Assistant Administrator for Water

Steven A. Herman
Assistant Administrator for Enforcement

Jean C. Nelson
General Counsel

TO: Regional Administrators
Regional Counsel

Recently, questions have been raised regarding EPA's interpretation of the scope of the "shield" associated with National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). Section 402(k) of the CWA -- the "shield" provision -- provides that compliance with an NPDES permit shall be deemed compliance, for purposes of section 309 and 505 enforcement, with sections 301, 302, 306, 307 and 403 of the CWA (except for any standard imposed under section 307 for toxic pollutants injurious to human health). This policy statement describes EPA's position on the scope of the authorization to discharge under an NPDES permit, and

the shield thus associated with the permit authorization.

Individual NPDES Permits

As part of an application for an individual NPDES permit, EPA requires that an applicant provide information on its facility. In the case of industrial permit applications, this includes specific information about the presence and quantity of a number of specific pollutants in the facility's effluent, as well as on all waste streams and operations contributing to the facility's effluent and the treatment the wastewater receives. Applications for municipal discharges focus primarily on the operation and treatment processes at the municipal treatment works. See 40 C.F.R. § 122.21.

Historically, EPA has viewed the permit, together with material submitted during the application process and information in the public record accompanying the permit, as important bases for an authorization to discharge under section 402 of the CWA. The availability of the section 402(k) shield is predicated upon the issuance of an NPDES permit and a permittee's full compliance with all applicable application requirements, any additional information requests made by the permit authority and any applicable notification requirements. See 40 C.F.R. §§ 122.41(1) and 122.42. Also see, 45 Fed. Reg. 33311-12, 33522-23 (May 19, 1980).

A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:

1) Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;[1]

2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process; and

3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process.[2]

With respect to subparts 2 and 3 of the permit authorization described above, EPA recognizes that a discharger may make changes to its permitted facility (which contribute pollutants to the effluent at a permitted outfall) during the effective period of the NPDES permit. Pollutants associated with these changes (provided they are within the scope of the operations identified in the permit application) are also authorized provided the discharger has complied in a timely manner with all applicable notification

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[1]Of course, authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit.

[2]The permit, of course, may explicitly prohibit or limit the scope of such discharges.

requirements (see 40 C.F.R. §§ 122.41(l) and 122.42(a) & (b) and the permit does not otherwise limit or prohibit such discharges.

Notwithstanding any pollutants that may be authorized pursuant to subparts 1 and 2 above, an NPDES permit does not authorize the discharge of any pollutants associated with wastestreams, operations, or processes which existed at the time of the permit application and which were not clearly identified during the application process.

General NPDES Permits

Section 402(k) also shields discharges of pollutants authorized under a general permit. EPA's position is that general permits authorize the discharge of all pollutants within the specified scope of a particular general permit, subject to all pollutant limits, notification requirements and other conditions within a particular general permit so long as the permittee complies with all EPA application requirements for the general permit.

EPA regulations provide the circumstances for which discharges may be authorized under a general permit. See 40 C.F.R. § 122.28. To obtain authorization to discharge under a general permit (and consequently, the protection of the shield), in most cases, the prospective permittee must submit either a written notice of intent to be subject to the general permit or a permit application as appropriate. General permittees are also subject to the notification provisions of 40 C.F.R. §§ 122.41 and 122.42.

Spills

While NPDES permits may authorize the discharge of pollutants associated with intermittent flows, permits do not generally authorize the discharge of pollutants associated with spills. There may be limited circumstances where anticipated spills are fully disclosed to EPA and considered during the permitting process as documented in the public record consistent with applicable NPDES regulations. In such circumstances, the discharge of pollutants from such spills would be authorized so long as the permit does not otherwise limit or prohibit such discharges and such a spill does not violate any statutory or regulatory provision.

CERCLA

Finally, there also has been some question regarding the relationship of the NPDES permit shield and the "federally permitted release" exemption under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA's position is that the scope of federally permitted releases under CERCLA section 101(10)(A), (B) and (C) is currently defined by the regulations at 40 C.F.R. § 117.12, which implement language in section 311 of the CWA that is very similar to the federally permitted release definitions. Thus, the Agency takes the position that the NPDES permit shield outlined above in no way expands the scope of the federally permitted releases under CERCLA.

Next Steps

The Office of Water has established two regulatory workgroups which are working on revisions to the NPDES permit application regulations for municipal and industrial dischargers. We want the regulations to ensure the applicant has the responsibility to more fully characterize the nature of its effluent, and the contributions of the effluent to the receiving water. In addressing this issue, we will review EPA's position on the scope of the shield provided by § 402(k). In addition, we will consider changes to related NPDES permit regulations, including whether to revise the requirements for: facilities to notify EPA (or the State) of modifications to its operations or processes; facilities to notify EPA (or the State) of changes in the discharge; notification to the public of the nature of the discharge limitations a permittee is held responsible for; and the use of indicator pollutants.

We encourage the Regions to actively participate in the development of these updated regulations. The current schedule calls for proposal of the changes to the municipal application requirements in 1994 and the promulgation of the revised regulations in 1996. Our new schedule for changes to the industrial application requirements, for which there is more interest in permit shield issues, is proposal of the regulation changes in FY 1995.

If you have any questions on these issues, please contact us or have your staff contact, Cynthia Dougherty in the Office of Water at 202 260-9545, David Hindin in the Office of Enforcement at 202 501-6004, or Richard Witt in OGC at 202 260-7715.

cc: Elliott P. Laws
Regional Water Management Division Directors
ORC Water Branch Chiefs
Lois Schiffer, DOJ
Joel Gross, DOJ

(3)

Supreme Court, U.S.
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No. 95-1732

IN THE

Supreme Court of the United States

October Term, 1995

CITY OF PORTLAND

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit Oregon corporation, and NINA BELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 23, 1996

6 pp

QUESTION PRESENTED

Does the Clean Water Act ("CWA" or "Act") authorize citizens to enforce narrative (non-quantified) permit conditions?

LIST OF INTERESTED PARTIES

The parties are correctly identified in the caption. Craig N. Johnston is counsel of record for both respondents. David A. Bledsoe of Perkins Coie is also counsel for respondents.

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NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit Oregon corporation, and NINA BELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Northwest Environmental Advocates and Nina Bell (collectively "NWEA") respectfully urge this Court to deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Ninth Circuit's opinion in the case of Northwest Environmental Advocates v. City of Portland, No. 92-35044. The Court of Appeals' opinion is reported at 56 F.3d 979 (1995) ("NWEA II") and is reproduced in the Appendix to the petition at App-34. For the convenience of the Court, all citations to the opinion will be to the opinion attached to the petition.

STATEMENT OF THE CASE

Petitioner City of Portland ("Portland") annually discharges hundreds of millions of gallons of diluted raw sewage from its combined sewage and stormwater collection system into the Willamette River and the Columbia Slough; these "combined sewer overflow" ("CSO") discharges cause severe violations of water quality standards.

The relevant permits in this case have at all times prohibited discharges that violate water quality standards. Specifically, Portland's 1984 National Pollutant Discharge Elimination System ("NPDES") Permit provided as follows:

> Notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate water quality standards as adopted in OAR 340-41-455 except in the following defined mixing zone: The mixing zone shall consist of a 100 foot radius from the point of discharge.

Portland's 1991 Permit contains two separate provisions (one for each basin) regarding water quality standard compliance for the CSO discharges. Both provisions provide that:

> No wastes shall be discharged and no activities shall be conducted which violate Water Quality Standards as adopted in OAR 340-41-445.

The issue in this case involves the enforceability of these permit conditions. Most NPDES permits, like Portland's, contain no other mechanism for ensuring compliance with water quality standards.[1]

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT DECISION IS FULLY CONSISTENT WITH THE CLEAN WATER ACT AND THE DECISIONS OF OTHER CIRCUITS

This is a plain meaning case. As the Ninth Circuit noted, "[t]he plain language of [the Clean Water Act] CWA § 505 [33 U.S.C. § 1365] authorizes citizens to enforce all permit conditions." *NWEA II*, Petition at App-49. Section 505 does this by authorizing citizens to bring suit against persons alleged to be in violation of any "effluent standard or limitation under this chapter." The term "effluent standard or limitation" is used as a term of art in § 505. The term is defined in § 505(f), and includes "a permit or condition thereof issued under section 1342 of this title . . ." 33 U.S.C. § 1365(f)(6).[2] Because § 402 of the Act, 33 U.S.C. § 1342,

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[1] The United States Environmental Protection Agency ("EPA") has indicated its belief that all permits issued in Oregon, Arizona and California contain identical or similar prohibitions. Brief of the Environmental Protection Agency Supporting [Respondents'] Petition for Rehearing ("EPA Brief"), App-26. While EPA does not indicate how many of these permits also contain numeric, water quality-based permit conditions, most do not.

[2] This definition distinguishes the term "effluent standard or limitation" from the more limited term "effluent limitation," which is defined separately at 33 USC § 1362(11). *See, infra*, pp. 7-8.

establishes the NPDES permit program, the clear language of § 505(f)(6) provides that citizens may enforce NPDES permit conditions in citizen suits under § 505.[3]

This plain meaning must control absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the legislative history underscores the plain meaning of § 505(f)(6). Most significantly, as noted by the Ninth Circuit, the Senate Report accompanying the passage of the CWA in 1972 explained in unmistakable terms that "*in addition to violations of section 301(a)* [33 U.S.C. § 1311, Effluent Limitations], citizens are granted authority to bring enforcement actions for violation of . . . *any* condition of *any* permit issued under section 402." Federal Water Pollution Control Act Amendments of 1972, S.Rep. No. 414, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (emphasis added); *see also NWEA II*, Petition at App-51.

Moreover, as also noted by the Ninth Circuit, the case law provides ample support for the court's interpretation of the effect of § 505(f)(6). *NWEA II*, Petition at App-52. We will address *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900 (1994) (*Jefferson County*) below. At this point we note only that numerous courts have held that § 505(f)(6) grants citizens an unqualified power to enforce any and all NPDES permit conditions. *See NWEA II*, Petition at App-52-56 (and cases

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[3] The Environmental Protection Agency agrees with the Ninth Circuit's view of the plain meaning of § 505(f)(6). EPA Brief, App-23.

cited therein); *see also United States v. Louisiana-Pacific Corp., slip opinion*, Civ. Act. No. C 78-0567 (N.D. Cal. 1990) (reproduced in the Appendix at App-28-34) (granting the Environmental Protection Agency ("EPA") the right to enforce the same type of permit condition at issue in this case).

Notwithstanding the clear statutory language, legislative history and case law, Portland argues that the CWA excepts from the realm of enforceable permit conditions narrative conditions that require compliance with water quality standards. Portland does not identify any textual basis for this exception. Instead, it raises three arguments in urging the Court to grant its petition in this case. First, Portland argues that allowing for the enforcement of these narrative conditions would be inconsistent with the Act's differentiation between effluent limitations and water quality standards. Petition at 9-10. Second, Portland maintains that allowing for the enforcement of these conditions would constitute an unwarranted extension of federal jurisdiction. Petition at 11-17. Finally, Portland contends that the Ninth Circuit's decision abrogates the permit shield doctrine. Petition at 17-20.

NWEA will address each of these arguments in turn. We will then address the effect of *Jefferson County*.

A. The Clean Water Act Authorizes Both Numeric and Narrative Effluent Limitations

Portland argues that the permit conditions at issue in this case are not true "effluent limitations," and that therefore they should not be enforceable. This argument fails to consider two threshold issues. First, as noted above, § 505(f)(6) specifically defines enforceable effluent standards and limitations in citizen suits to include all permit conditions. As noted by the

Ninth Circuit, in applying this language "several courts have held that citizens groups may seek to enforce many kinds of permit conditions besides effluent limitations." *NWEA II*, Petition at App-56 and cases cited therein.

Second, citizen suits are not the proper forum for determining the validity or appropriateness of permit conditions. It is well established that only state courts may review the validity of state-issued NPDES permits. *See Shell Oil Co. v. Train*, 585 F.2d 408 (CA9 1978); *District of Columbia v. Schramm*, 631 F.2d 854, 863 (CADC 1980); *American Paper Institute, Inc. v. U.S.E.P.A.*, 890 F.2d 869, 875 (CA7 1989); and *Municipal Authority of the Borough of St. Mary's v. U.S.E.P.A.*, 945 F.2d 67, 71 (CA3 1991). Moreover, the time for such challenges is at the point of permit issuance. Under Oregon law, permits must be challenged, if at all, within 60 days of issuance. ORS 183.484(2).[4] By failing to challenge the permit at the point of issuance, Portland lost "forever the right to do so." *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 78 (CA3 1990), *cert. denied*, 111 S. Ct. 1018 (1991) (involving a state-issued permit); *see also Texas Municipal Power Agency v. Administrator of the U.S.E.P.A.*, 836 F.2d 1482, 1484-85 (CA5 1988) (EPA-issued permit).

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[4] *See also* 33 USC § 1369(b)(1) and (2) (limiting challenges to EPA-issued NPDES permits to those filed in the appropriate Federal judicial district within 120 days of permit issuance, and specifically precluding the review of such conditions in enforcement actions).

Even if one were to assume the appropriateness of this inquiry, however, Portland misapprehends the concept of "effluent limitations." Section 502(11) of the CWA defines the phrase "effluent limitation" to mean "*any restriction* established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents ... including schedules of compliance." 33 U.S.C. § 1362(11) (emphasis added). This definition is broad enough to include narrative limitations. EPA has long construed it so, both in its permitting regulations and in the issuance of permits containing conditions just like those at issue in this case.[5] EPA's long-standing view is entitled to deference from this Court. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).[6]

The CWA contemplates two types of effluent limitations. First, § 301 requires the establishment of effluent limitations requiring compliance with specified technology-based requirements. *See, e.g.*, 33 U.S.C. § 1311(b)(1)(A) and (2)(A). Second, § 301(b)(1)(C) requires that all discharges meet more stringent limitations where necessary to comply with water quality standards.[7] It is the latter requirement that is at issue in this case. EPA's regulations confirm that limitations to assure compliance with water quality standards are proper by

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[5] *See* 40 C.F.R. § 122.44(k)(2) (1994); and *United States Steel Corp. v. Train*, 556 F.2d 822, 839-40 (CA7 1977) (upholding a similar condition).

[6] *See also* EPA Brief, App-23-24.

[7] *See also* Section 402(b), 33 USC § 1342(b), which requires the issuance of permits that ensure compliance with § 301.

precluding the issuance of any permit where its conditions cannot ensure compliance with water quality standards. 40 C.F.R. § 122.4(d). Further, 40 C.F.R. § 122.44(d) expands on this requirement by mandating that each permit control the discharge of pollutants that would cause, have the reasonable potential to cause, or contribute to the violation of any water quality standard. Thus, both the CWA and EPA's regulations mandate that NPDES permits compel compliance with water quality standards. *See also Arkansas v. Oklahoma*, 503 U.S. 91, 105-107 (1992) (upholding EPA's interpretation that NPDES permits must ensure compliance with the water quality standards of downstream states).

The permit conditions at issue in this case serve precisely the purpose of assuring compliance with water quality standards. The fact that they do so through a narrative prohibition does not render them illegal or unenforceable. As noted by EPA, "[n]othing in section 301 or elsewhere in the Act requires that such effluent limitations or permit conditions be expressed solely as end-of-pipe limitations." Brief of the Environmental Protection Agency Supporting [NWEA's] Petition for Rehearing ("EPA Brief"), pp. 10-11. To the contrary, "*any restriction*" is permissible. 33 U.S.C. § 1362(11) (emphasis added).

In *United States Steel Corp. v. Train*, 556 F.2d 822, 839-40 (CA7 1977) ("U.S. Steel"), the Seventh Circuit addressed a timely-filed challenge to a permit condition just like those at issue in this case. In *U.S. Steel*, the relevant condition precluded the discharger from causing the affected waters to violate Indiana's water quality standards for temperature. Noting that it knew of no other way to implement temperature-based standards, the Court of Appeals concluded

that '[b]ecause of the convenience of temperature limits, thermal water quality standards do not need to be 'translated' in order to become applicable to an individual discharger as effluent limitations." *Id.* at 840 fn. 27.

B. Congress Has Granted the Federal Courts Jurisdiction to Enforce Narrative, Water Quality-Based Permit Conditions

The CWA, its legislative history, and the relevant case law all indicate that § 505 grants citizens the authority to enforce any and all NPDES permit conditions, as noted above. Portland would have the Court create an unexpressed exception to § 505(f)(6) precluding the enforcement of narrative permit conditions. Portland relies chiefly on four cases, all of which are inapposite.

First, Portland asserts that the Ninth Circuit's opinion conflicts with *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (CA2 1993), which held that § 505 does not authorize citizens to enforce state-imposed permit conditions that are beyond the scope of the CWA. *Kodak* is in no way inconsistent with the Ninth Circuit's opinion. There is no credible argument to be made that conditions requiring compliance with water quality standards are beyond the scope of the CWA. The CWA and EPA's regulations expressly require such conditions. *See*, *supra* at pp. 5-8. Indeed, EPA utilizes permit conditions just like those at issue here. *See U.S. Steel*, 556 F.2d at 839-40. Further, EPA filed an *amicus* brief before the Ninth Circuit in this case supporting the establishment and enforceability of narrative, water quality-based permit conditions. EPA Brief, App-18-19, 22-27.

Portland next argues that the Ninth Circuit's opinion conflicts with *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (CA2 1984). *Hooker* involved the question whether citizens may intervene in actions brought by EPA, pursuant to § 504(a) of the CWA, 33 U.S.C. § 1364(a), to abate "imminent and substantial endangerment[s]." The Court of Appeals began with the correct assumption that the citizens could intervene only if they could have initiated the action themselves under § 505. *Hooker*, 749 F.2d at 978; *see also* 33 U.S.C. § 1365(b). In finding that the citizens could not have initiated the action themselves, however, the Second Circuit expressly relied on the fact that § 505(f) does not incorporate the "imminent and substantial endangerment" authority within the definition of enforceable "effluent standard[s] and limitation[s]." *Hooker*, 749 F.2d at 979. *Hooker* is clearly distinguishable from this case; here NWEA seeks to enforce permit conditions, which are expressly listed in § 505(f)(6) as being enforceable through citizen suits.

Third, Portland cites *American Paper Institute, Inc. v. Environmental Protection Agency*, 996 F.2d 346 (CADC 1993) ("*API*"), as allegedly indicating "that the intent of the Clean Water Act is to enforce water quality standards in citizen suits only through the effluent limitations established in each permit - not the wholesale incorporation of 'generic standards' relating to water quality." Petition at 15-16. This characterization is inaccurate. *API* involved a challenge to an EPA regulation requiring that NPDES permit writers translate narrative criteria addressing chemical pollutants (e.g., "no toxics in toxic amounts") into chemical-specific effluent limits. 996 F.2d at 350. Applying *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court of Appeals upheld the rule as a reasonable

means of assuring that NPDES permits ensure compliance with water quality standards. *API*, 996 F.2d at 351.

API at most stands for the proposition that EPA, as a matter of regulatory discretion, may require that permit-issuers translate certain narrative water quality criteria into chemical-specific limits in the permit issuance process. To date, EPA has chosen to assert this authority only with respect to chemical pollutants to implement the national water quality-based toxics control program. 54 Fed. Reg. 23868, 23871 (June 2, 1989). While both EPA and the Court of Appeals may view chemical-specific limits, where feasible, as the best means of implementing narrative criteria (and NWEA agrees), neither EPA nor the Court of Appeals suggests that this is the only lawful way through which water quality standards may be implemented. EPA's *amicus curiae* brief in this case specifically supports the enforceability of narrative, water quality-based permit conditions. EPA Brief, App-22-27.

There is good reason why EPA has not established an across-the-board requirement mandating numeric, end-of-pipe limits in all cases. As noted by the Ninth Circuit, "certain water quality standards cannot be expressed quantitatively, such as those that apply in this case to bacterial pollution, aesthetic conditions, and objectionable matter (scum, oily sleek, foul odors, and floating solids)." NWEA II, Petition at App-57 (citations omitted). EPA's regulations explicitly contemplate the establishment of narrative criteria. 40 C.F.R. § 131.11(b)(2). If narrative permit conditions were unenforceable, many of these standards would be rendered meaningless. There is simply no indication that Congress intended such a result.

The need for narrative effluent limitations is particularly strong in the CSO context, where the inability to control the amount of flow that is discharged during storm events makes it infeasible to establish numeric, end-of-pipe limitations to implement even numeric water quality criteria. The Ninth Circuit explained this dynamic in the following terms:

> . . . Because the number and volume of overflow events from CSO systems are caused primarily by uncontrollable events--i.e., the amount of stormwater entering the system--regulators have no ready way of determining what portion of the flow in a given discharge event is sewage and what portion is rainwater. Without this information, it is impossible to determine the level at which to set a numeric concentration-based permit limit in order to ensure that the gross amount of pollution discharged will not violate water quality standards.

NWEA II, Petition at App-59. As evidenced by the permit conditions in this case, in these circumstances permit-issuers rely on narrative permit conditions to ensure that the water quality-based requirements of the statute are met.[8] These conditions must be given meaning in the enforcement process.

---

[8] *See also U.S. Steel*, 556 F.2d at 839-40 (CA7 1977) (recognizing that permit issuers may simply incorporate water quality

Finally, Portland cites *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (CA9 1987), for the proposition that it is not the water quality standards themselves that are enforceable under § 301(b)(1)(C) [33 U.S.C. § 1311(b)(1)(C)], but the permit conditions necessary to meet those standards. Petition at 16. NWEA agrees. *See also NWEA II*, Petition at App-56-57, n.11. However, in this case, unlike *Oregon*, NWEA is seeking to enforce permit conditions. As EPA has noted:

> EPA concurs with the premise that the statute does not require permittees to comply with water quality standards "directly," or in the absence of a permit condition imposing such a requirement. However, the permit at issue here contains such a condition. Thus, the principle set forth in the *Oregon* case is inapposite to the question of whether a permit expressly prohibiting discharges that violate state standards is valid and enforceable by citizens.

EPA Brief, App-24.

Thus, all four of the cases cited by Portland are simply red herrings. There is no conflict among the circuits, or within the Ninth Circuit, that pertains to this action.

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standards into permit conditions where end-of-pipe limits are infeasible).

C. The Permit Shield Doctrine Supports the Enforceability of All Permit Conditions

Section 402(k) of the CWA establishes the bedrock principle that, with minor exceptions, permittees are to be judged by the standards of the permits under which their discharges are authorized. Specifically,

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317 and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health....

33 U.S.C. § 1342(k). The effect of this provision is simple: the permit is the measuring stick against which a permittee's compliance status is to be determined. By contrast, permittees are not to be judged according to requirements that were omitted from their permits or were promulgated after their permits were issued. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). In short, compliance with the permit is what matters.

NWEA seeks only to have Portland judged by the standards of its permits--nothing more and nothing less. This notion is fully consistent with § 402(k). In this case, each of the relevant permits contains a clear provision requiring that all discharges conform with water quality standards. The 1991 permit contains two separate water quality-based conditions (one for each basin) specifically relating to the CSO

discharges. Portland seeks to turn § 402(k) on its head, however, by arguing that it somehow shields Portland from complying with these conditions. Portland wants the permit shield doctrine to make the permit mean less than what it says. The Court should not condone this blatant rewriting of § 402(k) and the relevant permits.

Portland's reliance on EPA's "permit as a shield" policy is misplaced. The provisions that Portland quotes state a principle not applicable to this case: that the permit shield applies where a permittee has identified pollutants present in its discharge stream for which the permit-issuer ultimately declines to establish limitations. Petition at 18-19. That principle simply has no bearing where, as here, the authorization of relevant discharges is expressly conditioned on the requirement that they not cause water quality standard violations.

II. JEFFERSON COUNTY SUPPORTS THE NINTH CIRCUIT'S DECISION

The Ninth Circuit characterized *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, _____ U.S. _____, 114 S. Ct. 1900 (1994), as holding that the CWA "allows States to enforce the broad narrative criteria contained in water quality standards." *NWEA II*, Petition at App-52. Portland objects to the Ninth Circuit's characterization, arguing that *Jefferson County* stands only for the proposition that States may condition water quality certifications under § 401 of the Act, 33 U.S.C. § 1341, on requirements relating to the maintenance of stream flow where necessary to protect "designated uses." Petition at 20-21. Portland also stresses Judge Kleinfeld's language from his dissenting opinion in *NWEA II* to the effect that *Jefferson County* "does not involve

a citizens' suit, says nothing about citizens' suits, and implied nothing about citizens' suits." *Id.* at 20 (quoting from *NWEA II*, Petition at App-62 (Kleinfeld dissenting)). NWEA agrees that *Jefferson County* involved a state's enforcement of designated uses under § 401, and also that it did not directly speak to citizen enforcement under § 505. Nonetheless, the decision is relevant to the case at bar.

In *Jefferson County*, the petitioners argued that designated uses are too vague to be enforceable under § 401 of the Act. After first noting that "EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria[]," this Court addressed the vagueness argument in the following terms:

> Petitioners also appear to argue that use requirements are too open-ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria themselves. . . .
>
> . . . We think petitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that *the Act permits enforcement of broad, narrative criteria* based on, for example, "aesthetics."

Jefferson County, 114 S. Ct. at 1911 (emphasis added). This Court further noted the impact that the petitioners' interpretation would have on the implementation of the Act:

> Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

Jefferson County, 114 S. Ct. at 1912.

The thrust of Portland's argument in this case is very similar to that advanced by the petitioners in *Jefferson County* – *i.e.*, that narrative permit conditions requiring compliance with water quality standards are too vague to be enforceable. As the Ninth Circuit noted, however, "interpreting § 505 to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations" would "immunize the entire body of qualitative regulations from an important enforcement tool." NWEA II, Petition at App-58.

In *Jefferson County*, this Court indicated its reluctance to interpret the CWA in a manner that would frustrate the achievement of its water quality-based requirements. 114 S. Ct. at 1912. The Ninth Circuit did not view itself as bound by the *Jefferson County* decision; it expressly recognized that the two cases involved different statutory dynamics. *NWEA II*, Petition at App-55. Instead, the Ninth Circuit simply applied

the reasoning of *Jefferson County* to the similar issues presented in this case. After noting the difficulties both of establishing numeric, end-of-pipe limits to ensure compliance with narrative criteria and even of implementing numeric criteria where it is infeasible to control the amount of flow, the Ninth Circuit properly concluded that the teaching of *Jefferson County* counseled a similar result in the case before it. This Court should support that decision.[9]

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[9] To the extent that Portland seeks to distinguish *Jefferson County* because it involved State and not citizen enforcement, it is enough to point out that nothing in either the CWA or its legislative history suggests that citizens are to be more limited than EPA or the states with respect to the types of permit conditions they are entitled to enforce. *Compare* § 309(d) (allowing EPA to seek civil penalties for violation of permit conditions) and § 505(f)(6) (authorizing citizens to enforce permit conditions); *see also NWEA II*, Petition at 55 (noting that citizens may enforce the same permit conditions that States may enforce).

III. CONCLUSION

For these reasons, NWEA respectfully requests that the Court deny Portland's writ of certiorari.

Respectfully submitted this 23rd day of May, 1996.

Respectfully submitted,

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§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No

license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the

case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will

violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the

request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

UNITED STATES CODE
TITLE 33
SECTION 1362

Section 1362. Definitions

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

UNITED STATES CODE
TITLE 33
SECTION 1364

Section 1364. Emergency powers

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

40 CODE OF FEDERAL REGULATIONS
SECTION 122.4(d)

Section 122.4. Prohibitions (applicable to State NPDES programs, *see* § 123.25).

No permit may be issued:

* * *

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

40 CODE OF FEDERAL REGULATIONS SECTION 122.44 (d)(1)(i)

Section 122.44(d)(1)(i).

(d) *Water quality standards and State requirements*: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

40 CODE OF FEDERAL REGULATIONS SECTION 131.11(b)(2)

Section 131.11(b)(2) Criteria.

(b) Form of criteria. In establishing criteria, States should:

* * *

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criterial cannot be established or to supplement numerical criteria.

OREGON REVISED STATUTES

Section 183.484(2)

* * *

(2) Petitions for review shall be filed within 60 days only following the date the order is served, or if a petition for reconsideration or rehearing has been filed, then within 60 days only following the date the order denying such petition is served. If the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed, and in such case petition for judicial review shall be filed within 60 days only following such date. Date of service shall be the date on which the agency delivered or mailed its order in accordance with ORS 183.470.

Docket No. 92-35044

In the

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES, a Non-Profit Oregon corporation, and NINA BELL,

Appellants,

v.

CITY OF PORTLAND,

Appellee.

BRIEF OF THE ENVIRONMENTAL PROTECTION AGENCY SUPPORTING THE PETITION FOR REHEARING/ SUGGESTION FOR REHEARING EN BANC

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BRIEF OF THE ENVIRONMENTAL PROTECTION AGENCY SUPPORTING THE PETITION FOR REHEARING/ SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 35 of this Court, the United States of America submits this memorandum in support of appellant's Petition For Rehearing With Suggestion For Rehearing En Banc of the decision (Addendum I hereto), issued on December 10, 1993 by a panel consisting of Circuit Judges Kleinfeld and Pregerson and District Judge Ingram.

We express a belief that this appeal involves a question of exceptional importance: may citizens enforce a condition in a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to the Clean Water Act ("the Act") that requires the permittee to ensure that discharges do not cause receiving waters to violate state water quality standards?

The United States has a direct interest in the development of the law regarding citizen enforcement of the Act because citizens play a crucial role in Clean Water Act enforcement. The panel decision hinged upon the panel's conclusion that permit conditions prohibiting discharges that violate water quality standards can be enforced by citizens only if they are expressed as end-of-the-pipe effluent limitations. EPA and states commonly include permit conditions prohibiting discharges that cause violations of state water quality standards using language similar to that employed here, particularly when regulating stormwater discharges or combined sewer and stormwater overflows ("CSOs"). Because citizen enforcement provides a crucial supplement to state and federal enforcement, the panel decision threatens to undermine severely an important source for enforcement of a proper, commonly used permit condition.

STATUTORY SCHEME

The Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 et seq., is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The Act prohibits the discharge of any pollutant from any point source into the nation's waters unless the discharge complies with the Act's requirements. 33 U.S.C. §§ 1311(a), 1362(12). For most dischargers, compliance is achieved by obtaining and adhering to the terms of an NPDES permit

pursuant to section 402 of the Act. 33 U.S.C. § 1342. See EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976).

Because Congress intended that "states should play the leading role in implementing the NPDES [program]," American Paper Inst. v. EPA, 890 F.2d 869, 873 (7th Cir. 1989) (footnote omitted), EPA has granted 40 states, including Oregon, authority to issue NPDES permits. See 33 U.S.C. § 1342(b). In authorized states, NPDES permits are issued by the appropriate state agency, subject to EPA review. 33 U.S.C. § 1342(d). A final state-issued permit is subject to judicial review in state court, with the state, not EPA, defending the permit decision and terms. See American Paper Inst. v. EPA, 890 F.2d at 874-75. Under Oregon law, NPDES permits must be challenged within 60 days of issuance. Or. Rev. Stat. § 183.484(2) (1991).

NPDES permits must include conditions ensuring that the discharge complies with the substantive provisions of the Act. 33 U.S.C. § 1342(a)(2). In particular, all NPDES permits must contain the more stringent of: (1) technology-based effluent limitations which reflect the pollution reduction achievable based on several levels of pollution control or process changes, without reference to the effect on the receiving water; or (2) effluent limitations representing that level of control necessary to ensure that the receiving waters attain and maintain state water quality standards. 33 U.S.C. § 1311(b), 1313(c).

Technology-based effluent limitations are usually based upon guidelines promulgated by EPA, and are restrictions on the quantities, rates, and concentrations of specified pollutants. See 33 U.S.C. § 1311, 1314. The guidelines, and the corresponding effluent limitations, are based upon the levels of control that can be achieved by application of the best

available technology economically achievable, and define permissible levels of discharges.[10] 33 U.S.C. § 1311.

Water quality standards under the Act consist of two principal elements: (1) a designated "use"[11] of waters consistent with the goals of the Act as set forth in 33 U.S.C. § 1251(a)(2); see 40 C.F.R. § 130.3; and (2) "criteria" specifying the amounts of various pollutants that may be present in those waters without impairing the designated uses, expressed in numerical concentration limits or in narrative form. 33 U.S.C. § 1313(c)(2)(A). States are also required to adopt an antidegradation policy which, among other things, mandates that existing uses of waters be maintained, as well as the level of water quality necessary to maintain those existing uses. 40 C.F.R. § 131.6

States are required by section 303 to adopt water quality standards, subject to EPA approval. 33 U.S.C. § 1313(c)(3). If a state does not adopt a water quality standard, EPA is required to adopt such standards for the state. Id. In accordance with this provision, Oregon has adopted water quality standards applicable to the waters and pollutants that are the subject of the citizen suit.

Water quality-based permit effluent limitations are unlike technology-based effluent limitations in that they are formulated without regard to technological capacity to restrict harmful discharges. Water quality-based effluent limitations

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[10] While effluent limitation guidelines and corresponding effluent limitations generally are expressed as numeric concentrations of specific pollutants, such guidelines may also include narrative restrictions. See, e.g. 40 C.F.R. § 435.13 note 4; amendment to § 435.13, 58 Fed. Reg. 12506 (March 4, 1993).

[11] Designated uses of the water may include, for example, public water supply, recreation, propagation of fish, and agriculture.

are designed to ensure that the discharge will not cause or contribute to violations of state standards. 33 U.S.C. § 1311(b)(1)(C). As with technology-based effluent limitations, two types of water quality based limitations may be written into permits. The first type contains numeric limitations on the quantities, rates, and concentrations of specified substances that are discharged, and is generally expressed using end-of-the-pipe limitations.

The second type provides narrative limitations. One common example of this type of limitation is a condition prohibiting discharges that cause or contribute to violations of state water quality standards.[12] The permit condition at issue in this appeal falls within this latter category.

The Act authorizes citizen plaintiffs to enforce permit conditions. The citizen suit provision, section 505, provides that citizen plaintiffs may enforce "an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). This section defines "effluent standard or limitation" as, inter alia, "a permit or condition thereof issued under section 1342." 33 U.S.C. § 1365(a)(1) and (f)(6).

The enforcement section of the Act, 33 U.S.C. § 1319(d), authorizes imposition of civil penalties for violations of "any permit condition or limitation" implementing the Act's substantive provisions. The Act defines "effluent limitation"

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[12] EPA's NPDES permitting regulations recognize that effluent limitations need not be either numeric or end-of-pipe limitations. See, e.g. 40 CFR 122.44(k) (authorizing permit conditions relating to the use of best management practices in addition to, or in lieu of, numeric limitations); 40 CFR 440 (addressing best management practices for mines). Best management practices include, for example, operating procedures or practices to control plant site runoff, spillage or leaks that would pollute surface waters. 40 CFR § 122.2.

as "any restriction established by a State or the Administrator" on quantities, discharge rates and concentrations of a pollutant discharged into a water of the United States. 33 U.S.C. § 1362(11).

STATEMENT

Nature of the Case, Course of Proceedings and Summary.

From 1984 to August 1991, the City of Portland ("the City") operated a sewage treatment plant under an Oregon NPDES permit issued in 1984. Northwest Environmental Advocates et al. v. City of Portland, No. 91-339-PA, slip op. at 4 (D. Or. Dec. 13, 1991) ("opinion below"). The City's antiquated sewage and stormwater systems were combined and regularly discharged storm water and sewage from approximately forty overflow outlets into the Willamette River and Columbia Slough, a tributary of the Willamette River. Id. at 2-3. In 1990, the City began to negotiate with the State concerning the permit that would replace the expiring 1984 permit. Id. at 4. The State sought to include a schedule in the new permit by which the City would eliminate the combined sewer overflows, (CSOs), but the City complained that it could not accomplish this in the five-year time period contemplated by the permit. Id. In August 1991, the State and the City finalized a stipulation under which the City would have twenty years to eliminate the CSOs. Id. at 5.

In March 1991, while the negotiations were pending, the citizens group, Northwest Environmental Advocates and its executive director, Nina Bell ("the citizens"), brought this suit under the Act's citizen suit provision, 33 U.S.C. § 1365. The citizens' complaint alleged that the 1984 permit covered only discharges from the City's sewage treatment plant, not from the CSOs, and the CSOs were thus unpermitted discharges. Id. at 5. The citizens also alleged that even if the CSOs were

covered by the 1984 permit, that permit contained a condition prohibiting the discharges from violating state water quality standards, and this condition was violated. Id. at 12-13.[13] The citizens argued that the citizen suit provision, section 505(a), authorizes citizen plaintiffs to enforce permits or conditions thereof. Id. at 15. See 33 U.S.C. § 1365(a)(1) and (f)(6).

The district court interpreted the City's permit and held that the City's CSO discharges were authorized by the 1984 permit. Decision below at 12. The court also held that although the 1984 permit referred to the Oregon water quality standards, it did not incorporate an enforceable condition because the "mere reference to water quality standards" in a permit does constitute an effluent standard or limitation for purposes of section 505. Id. at 15-16

The Ninth Circuit's panel decision upheld as "not clearly erroneous" the district court's first holding that the permit covered the CSOs. Panel Opinion ("Opinion") at 13915. The panel also affirmed the district court's holding that the citizens could not enforce the permit's requirement that discharges not violate water quality standards, concluding that because the citizens did not allege that the City violated end-of-pipe limitations designed to achieve water quality standards, the citizens lacked standing under section 505. Id. at 13920. The panel stated that "it is the duty of the permit-issuing authority to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met." Id. at 13920 (emphasis in original). In making the statement that end-of-pipe limitations are required, the panel did not rely upon

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[13] The 1984 permit stated "notwithstanding the effluent limitations established by this permit, no wastes shall be discharged and no activities shall be conducted which will violate Water Quality Standards of Oregon. Id. at 14.

explicit statutory language.[14] Indeed, the panel noted that section 505, 33 U.S.C. § 1365, the citizen suit provision, provides that citizens may enforce "an effluent standard or limitation," and that the section broadly defines "effluent standard or limitation" as, inter alia, "a permit or condition thereof issued under section 1342." Opinion at 13919-20, (citing 33 U.S.C. § 1365(a)(1) and (f)(6)). However, the panel relied upon legislative history to disregard this statutory language, claiming that Congress did not intend the "limitless grant of jurisdiction" connoted by section 1365. Opinion at 13921-24.

As the panel noted, legislative history reveals that before the 1972 amendments to the Act, the statute did not require permits or mandate any effluent limitations, end-of-pipe or otherwise, but rather relied solely upon enforcement of state water quality standards. Id. Because enforcement of water quality standards was "almost non-existent," Congress developed the current approach whereby technology-based effluent limitations are written into easily enforced permits. Id. The panel emphasized that because Congress viewed effluent limitations in permits as superior to the pre-1972 enforcement scheme, it must not have intended to allow citizen enforcement of permit conditions prohibiting discharges in violation of state standards in the absence of end-of-pipe limitations. Id. at 13921-25.

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[14] As the panel noted, its opinion was the first court of appeals decision addressing the enforceability of a permit condition requiring that the permittee's discharges not violate state standards. Opinion at 13917.

ARGUMENT

A. Permit Conditions Based Upon the Effect Discharges May Have Upon Receiving Waters Are Valid and Enforceable by Citizens.

a. Underlying the panel's holding that the permit condition is unenforceable by citizens was the conclusion that permit writers must incorporate end-of-pipe limitations. Id. at 13920. The plain language of the Act demonstrates that the Portland permit condition, expressed in terms of the effect that discharges may have upon receiving water, is a legal, enforceable effluent limitation.

Section 301(b)(1)(C) mandates that point sources be subject to effluent limitations necessary to ensure that state water quality standards are not violated. 33 U.S.C. § 1311(b)(1)(C); See Trustees of Alaska v. EPA, 749 F.2d 549, 557 (9th Cir. 1984). Section 402 authorizes states and EPA to issue permits insuring compliance with section 301, 33 U.S.C. § 1311. 33 U.S.C. § 1342.[15] Nothing in section 301 or elsewhere in the Act requires that such effluent limitations or permit conditions be expressed solely as end-of-pipe limitations.

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[15] As the panel noted, section 402 authorizes permits ensuring compliance with 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318 and 1343. Slip op. at 13920. However, the panel inaccurately cited section 402(b)(1)(C) and 402(b)(2)(A) for this proposition; it is section 402(b)(1)(A) that requires that state permits ensure compliance with sections 1311, 1312, 1316, 1317 and 1343. 33 U.S.C. § 1342(b)(1)(A). Section 402(b)(2)(A) requires that state permits ensure compliance with section 1318. 33 U.S.C. § 1342(b)(2)(A). Section 402(a)(1) sets forth this requirement for permits that EPA issues. 33 U.S.C. § 1342(a)(1).

Moreover, the citizen suit provision, section 505, authorizes citizens to enforce "effluent limitations" and provides a definition for that term as it is used within that section. This definition provides that "effluent limitation" is a "permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter." 33 U.S.C. 1365(f)(6). Because this section unequivocally authorizes citizens to enforce conditions in permits issued by states or EPA pursuant to section 402, the panel was incorrect in holding that the citizens could not enforce the condition.

The conclusion that Congress did not intend to restrict effluent limitations to end-of-pipe limitations is confirmed by the definition of "effluent limitation" found in section 502(11), 33 U.S.C. §§ 1362(11). This definition governs the use of the term "effluent limitation" as generally used in the Act. The definition states that "effluent limitation" means:

> any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). This definition encompasses any restriction upon the nature of permitted discharges, and therefore encompasses conditions based upon the discharge's effect upon receiving waters. The requirement in Portland's permit that discharges not violate state standards restricts what the City may discharge, and expresses that restriction in term of the effect the discharges have upon receiving waters. Thus, the permit condition constitutes a restriction under section 502(11).

The panel opinion failed to address this clear statutory evidence. Rather, the opinion summarized these statutory provisions, and then set forth the whole of the panel's analysis of these provisions:

> None of these sections, however, require [sic] that a permittee directly comply with water quality standards. Rather, it is the duty of the permit-issuing authority to include in the permit end-of-pipe effluent limitations that will ensure that water quality standards are met. See Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987).

Opinion at 13920 (emphasis in original). The Oregon case cited by the panel held that water quality standards are not imposed in the absence of a permit condition. Oregon Natural Resources Council v. United States Forest Service, 834 F.2d at 850. EPA concurs with the premise that the statute does not require permittees to comply with water quality standards "directly," or in the absence of a permit condition imposing such a requirement. However, the permit at issue here contains such a condition. Thus, the principle set forth in the Oregon case is inapposite to the question of whether a permit expressly prohibiting discharges that violate state standards is valid and enforceable by citizens. None of the statutory provisions considered by the panel support the conclusion that a permit is not enforceable by citizens unless it incorporates end-of-pipe limitations.

Moreover, the last time the Act was amended, Congress gave increasing prominence to state water quality standards. In 1987 Congress amended section 303(c)(2)(B) to require states to adopt numeric criteria for certain toxic pollutants that

are expected to impede attainment of state standards. Water Quality Act of 1987, Pub. L. No. 100-4, § 308(d), 101 Stat. 39. See also page 3, supra. Congress also amended section 304 to require that states (1) identify water bodies that are not expected to attain state water quality standards due to discharges of toxic pollutants and (2) develop strategies for reducing the discharge of the relevant toxic pollutants. Pub. L. No. 100-4, 308(a), 101 Stat. 39; see 33 U.S.C. 1314(1). The Act thus casts state standards in a central role, and provides broad authority for states to impose and citizens to enforce permit conditions that implement those standards.[16]

b. In light of clear statutory language, the panel need not have considered legislative history. In re Perroton, 958 F.2d 889, 893 (9th Cir. 1992) ("If the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent rare and exceptional circumstances."). However, the panel also erred in its assessment of the legislative history; the panel read into the history an ambiguity which cannot fairly be found, and then relied upon that ambiguity to disregard clear statutory language.

The panel opinion recognized that when amending the Act Congress sought to employ end-of-pipe limitations in order to enhance the pre-1972 system of enforcement of water

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[16] Additionally, it was improper for the district court to have reviewed the validity of the permit condition because there is no federal judicial review of any aspect of state-issued permits. See American Paper Institute, Inc. v. EPA, 890 F.2d 869, 874 (7th Cir. 1989); District of Columbia v. Schramm, 631 F.2d 854, 862-63 (D.C. Cir. 1980); Natural Resources Defense Council v. Outboard Marine, 702 F. Supp. 690, 694 (N.D. Ill. 1988); Under state law governing issuance of the state permit, NPDES permittees must challenge permits within 60 days of issuance. Or. Rev. Stat. § 183.484(2) (1991).

quality standards. Opinion at 13921-22. The panel stated that the legislative history is ambiguous, and supports both sides of the argument concerning whether citizens may enforce the permit condition at issue. Id. However, the panel concluded that because Congress viewed end-of-pipe limitations as superior, it intended to preclude citizen enforcement of state standards in the absence of such limitations. Id. at 13921-24.

Yet it cannot be assumed absent express congressional direction that Congress intended that end-of-pipe limitations become the exclusive means by which water quality standards may be achieved. As Judge Pregerson noted in his dissenting opinion, legislative history does not support the interpretation that Congress intended to restrict citizen enforcement to end-of-pipe limitations. Opinion at 13927 (emphasis in original). Indeed, the panel does not point to any legislative history so indicating. The history upon which the majority relies reflects Congress' intent to, in Judge Pregerson words, "improve enforcement, not to supplant the old system." Id.

Legislative history is consistent with the broad language in sections 402 and 502 concerning permit limitations that may be used to achieve state standards. See pages 10-12, supra. Similarly, the desire to enhance enforcement revealed in legislative history is reflected in the section 1365(f)(6) mandate that citizens may enforce any such permit condition. Id. The panel improperly failed to give effect to the Act's clear language.

The practical implications of the panel opinion are severe. It is EPA's understanding that all NPDES permits in the state of Oregon contain the condition at issue here, and all permits issued by Arizona and California contain similar prohibitions against exceeding water quality standards. Because citizen enforcement of NPDES permits provides an essential supplement to governmental enforcement, the panel opinion

threatens to greatly hinder Clean Water Act regulation in those three states.

For the foregoing reasons, Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc should be granted.

Respectfully Submitted,

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Environment and Natural Resources Division

/s/
Peter J. Steenland,
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Attorneys, Department of Justice

Nos. C 78-0567 MHP and C 89-1738 MHP

In the

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION,

Defendant.

SURFRIDER FOUNDATION,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION and
SIMPSON PAPER COMPANY,

Defendants.

OPINION

Defendants, Simpson Paper Company ("Simpson") and Louisiana-Pacific Corporation ("L-P") (collectively, "the Mills" or "the Companies"), discharge effluent into the Pacific Ocean under National Pollutant Discharge Elimination System ("NPDES") permits issued on July 13, 1987 by the Environmental Protection Agency ("EPA") Regional Administrator pursuant to section 301(m) of the Clean Water Act. 33 U.S.C. § 1311(m)(l)(F). Plaintiffs, the United States and the Surfrider Foundation, allege that defendants have consistently violated the limits for chronic toxicity set under those permits and seek, inter alia, injunctive relief and penalties for the violations. The parties are now before the court on defendants' motion to dismiss certain claims in the Amended Complaint in Intervention and the Amended Supplemental Complaint. Having considered the papers submitted and the arguments of the parties, for the following reasons, the court grants in part and denies in part defendants' motion.

BACKGROUND

The background of the underlying action is set out fully in this court's order of June 14, 1990 and will not be repeated here. The parties have now come to the court on defendants' motion to dismiss claims of the amended complaints which were filed earlier this year.

Defendants present three issues for the court's consideration: (1) whether plaintiffs can seek enforcement of certain permit conditions based on alleged violations of receiving water limitations; (2) whether plaintiffs can be redressed for violations of an administrative order prior to the time the order was issued; and (3) whether plaintiffs can

compel compliance with a discharge limitation whose status is unclear at present.[17]

DISCUSSION

A. Violations of Water Quality Standards

Defendants argue that the penalties sought by plaintiffs for violations of effluent limitations exceed the scope of section 309(d) of the Clean Water Act. Plaintiffs argue that defendants' resistance is in fact a protest of a permit condition and, as such, defendants are barred from raising the issue in this court because they have not exhausted their administrative remedies. Defendants counter that, whether or not they exhausted their administrative remedies, the penalties sought by the government are outside the purview of the statute, therefore depriving this court of jurisdiction to hear those claims.

The court would only be deprived of jurisdiction if section 309 did not provide for imposition of penalties for violations of water quality standards. On its face, section 309 states that civil penalties may be imposed for violations of "any permit condition or limitation . . . ." 33 U.S.C. 1319(d) (emphasis added). As the water quality standards at issue have been explicitly stated in defendants' NPDES permit, there is nothing to suggest that they are not exactly the type of conditions to which section 309 refers.

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[17] Specifically, defendants want the court to dismiss the seventh, eighth, ninth and tenth claims for relief in the Amended Complaint in Intervention against Simpson Paper Company and paragraph 25 of the second claim, as well as the eighth, ninth, tenth and eleventh claims for relief in the Amended Supplemental Complaint against Louisiana-Pacific Corporation.

Defendants' attempt to create a distinction between contesting permit conditions and contesting the enforcement of conditions in their permit is unavailing. If defendants believed that these standards were impermissibly vague and therefore unenforceable, they could have appealed them to the EPA.

Nor is defendants' citation to 40 C.F.R. § 122.45(d) persuasive. Although this section does suggest that permit water quality standards for continuous discharges should be reduced to numerical limitations if practicable, a determination of whether said standards should have been reduced rather than stated in narrative terms is properly addressed to the agency during the permit stage. The sole question now before the court on the narrative conditions is whether plaintiff can establish with sufficient scientific accuracy that the conditions have been violated. This is a matter of proof and the subject of expert testimony.

Finally, the cases and statutes cited by defendants do not support their proposition that narrative standards cannot be enforced in addition to numerical limitations. See, e.g., EPA v. Water Resources Control Bd., 426 U.S. 200, 205 n.12 ("Water quality standards are retained as a supplementary basis for effluent limitations"); Sierra Club v. Union Oil of California, 813 F.2d 1480, 1483 (9th Cir. 1987) (same), vacated on other grounds, 485 U.S. 931 (1988); Trustees for Alaska v. EPA, 749 F.2d 549, 557 (9th Cir. 1984) (numerical limitations needed in addition to water quality standards where water quality standards must be translated); Oregon Natural Resource Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (no NPDES permit). Accordingly, defendants' motion to dismiss these claims is denied.

B. Violations of EPA Order

The United States has asserted that during the period October 1987 to November 19, 1988, defendants violated an EPA order requiring defendants to monitor the chronic toxicity of their discharges using a certain sea urchin protocol. However, plaintiffs have now conceded that because the EPA order was not entered until September 20, 1988, they are not entitled to relief for alleged violations which occurred prior to the entry of the order. Therefore, the United States has stipulated that its tenth claim for relief in the Amended Complaint in Intervention against Simpson and its eleventh claim for relief in the Amended Supplemental Complaint against L-P may be dismissed to the extent that plaintiffs seek penalties for the period from October 1987 to September 20, 1988. Accordingly, those claims are DISMISSED except as to the period beginning September 20, 1988.

C. Water Treatment Plant Limitations

The Amended Supplemental Complaint against L-P charges the company with violating "the limit on total suspended solids applicable to its water treatment works." See Amended Supp. Cmplt. at par. 25. L-P's NPDES permit required L-P to remove seventy five percent of the total suspended solids taken into its water treatment plant before discharging the wastewater into the Pacific Ocean. However, the permit also provided that if L-P's request for an exception then pending in front of the State Water Resources Control Board's were granted, the alternative limit chosen would automatically apply.

On November 17, 1987 L-P's request for an exception was approved. The State Water Resources Control Board's resolution deleted the removal requirement without imposing an alternative limit. Defendant argues, therefore, that there is

currently no requirement to be enforced and that the Government's second claim for relief should be dismissed.[18]

As both parties note, however, in response to citizen group challenges of the exemption provision, the EPA Chief Judicial Officer found the automatic exemption provision to be "a troublesome feature of the permits that allows circumvention of applicable public participation procedures" legislated in 40 C.F.R. part 124. See Ex. F. to Smith Dec.

Furthermore, L-P has filed a request for clarification of the Chief Judicial Officer's ruling and, in response to the ruling, EPA Region 9 has initiated permit modification proceedings. L-P's request questions whether the intent of the Chief Judicial Officer's Order was to invalidate the automatic modification provision from the date it was issued, hence prohibiting it from coming into effect.

The Chief Judicial Officer's response should clarify for which periods of time the removal requirement has been in effect. Accordingly, the court denies defendants' motion to dismiss the second claim without prejudice to renew it after the Chief Judicial Officer responds to the request for clarification.

CONCLUSION

As set out above, the court GRANTS IN PART and DENIES IN PART defendants' motion to dismiss.

IT IS SO ORDERED.

Dated: [SEP 26, 1990] /s/

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[18] Defendants' severability argument raised in their reply brief is completely unpersuasive.

MARILYN HALL PATEL
United States District Judge

(4)

95-1732

No. ___-____

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

In the
Supreme Court of the United States
October Term, 1995

CITY OF PORTLAND,

Petitioner,

vs.

NORTHWEST ENVIRONMENTAL ADVOCATES, a Non-Profit Oregon Corporation, and NINA BELL,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of 65 California Cities and Towns, the Santa Clara Valley Nonpoint Source Pollution Control Program, 3 California Sanitation Agencies, and the California Association of Sanitation Agencies as *Amici Curiae* in Support of Petitioner City of Portland

Filed with the Written Consent of Parties

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15 pp

LIST OF *AMICI CURIAE*

- The Santa Clara Valley Nonpoint Source Pollution Control Program

- The California Association of Sanitation Agencies

- 65 California Cities and Towns:

Apple Valley
Bear Lake
Burlingame
Camarillo
Carlsbad
Cathedral City
Chico
Chula Vista
Clearlake
Cloverdale
Coronado
Cotati
Corte Madera
Cupertino
Daly City
Dana Point
Del Mar
East Palo Alto
Eureka
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Monterey
Moreno Valley
Novato
Oceanside
Orinda
Palm Desert
Palo Alto
Parlier
Piedmont
Pittsburg
Portola Valley
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Solana Beach
Soledad
Sonoma
South San Francisco
Sunnyvale
Sutter Creek
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- 3 California Sanitation Districts:

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INTRODUCTION AND SUMMARY OF ARGUMENT

Judge O'Scannlain, joined by three other Ninth Circuit judges, did not exaggerate when he stated that the panel opinion in this case "significantly reshaped federal environmental law," "upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law," and will be "astronomically costly to the municipalities affected." *Northwest Envtl. Advocates v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) (O'Scannlain, J., dissenting from order rejecting suggestion for rehearing *en banc*).

Amici curiae herein are such municipalities and other local public agencies within the State of California which would face the astronomical costs referenced by Judge O'Scannlain, should this Court not grant the Petition for Writ of *Certiorari* filed by the City of Portland in this case on April 23, 1996. The State of California has strict environmental laws governing water quality which go beyond the scope of the federal Clean Water Act, but which do not authorize citizen suits. The panel opinion, in many cases, would provide federal court jurisdiction for citizens to sue to enforce California's strict standards and requirements in the guise of a Clean Water Act lawsuit, circumventing the administrative and judicial remedies California makes otherwise available. This holding directly conflicts with a prior decision by the Second Circuit and the plain language of the applicable provisions of the Clean Water Act, all of which were overlooked by the panel majority.

Amici, with the written consent of the parties (see Appendix A), thus submit this brief to highlight the importance of the question of federal law presented and to urge this Court to grant the City of Portland's petition.

INTERESTS OF *AMICI CURIAE*

Amici herein represent the interests of local public agencies within the State of California which either are, or in the near future may be, subject to one or more National Pollutant Discharge Elimination System ("NPDES") permits for the discharge of wastewater and/or stormwater. While *amici* speak based on their experience in California, their concerns are similar to those of municipalities throughout the nation.

Some of the *amici* California cities and towns, and all of the *amici* sanitation agencies, operate their own wastewater treatment plants. Further, all *amici* cities and towns need to operate drainage facilities to collect and channel stormwater flows. Each *amici* either is required to have an NPDES permit for such operations, or, in the case of stormwater flows in some smaller cities and towns, may be required to obtain an NPDES permit in the near future, *see*, 33 U.S.C.A. § 1342(p) (West Supp. 1996). *Amici* California cities and towns have joined this brief at the urging of the Legal Advocacy Committee of the League of California Cities.

The Santa Clara Valley Nonpoint Source Pollution Control Program is comprised of the Santa Clara Valley Water District, the County of Santa Clara, the Cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, and the Towns of Los Altos Hills and Los Gatos. These municipalities have joined together to administer stormwater pollution control programs throughout the Silicon Valley area of California as required by an NPDES stormwater permit issued jointly to the participants by the California Regional Water Quality Control Board, San Francisco Bay Region pursuant to both the Clean Water Act and State law.

The California Association of Sanitation Agencies represents 90 agencies comprising sanitary districts, sanitation districts, municipal utility districts, and other similar agencies within the State of California involved in wastewater treatment. Together, these agencies serve approximately two-thirds of the sewered population of California (approximately 20 million), as well as commercial and industrial dischargers. Wastewater discharges from these agencies are subject to NPDES permits.

ARGUMENT

By a split 2-1 decision, the Ninth Circuit panel in this case held that, even if a municipal NPDES permittee complies with all of the specific effluent limitations, monitoring, reporting, and programmatic requirements of the NPDES permit, the permittee can still be sued in federal court under the Clean Water Act if compliance with those requirements does not successfully attain the state's water quality goals. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 985-990 (9th Cir. 1995). Under this holding, such a lawsuit may be filed so long as the state issuing the NPDES permit includes (based on *state*, rather than *federal*, law or policy) a blanket, vague prohibition against discharges causing a violation of its water quality standards. In reaching its holding, the panel vacated its prior opinion in this same case reaching the opposite conclusion. *Northwest Envtl. Advocates v. City of Portland*, 11 F.3d 900, 906-911 (9th Cir. 1993).[1]

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[1]The convoluted procedural history of this case, in which the panel rescinded its prior opinion and reversed itself long after it should have lost jurisdiction (and after the entire Ninth Circuit denied rehearing *en banc*), based on a skewed reading of this Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, __ U.S. __, 114 S.Ct.

For the reasons set forth below, *amici curiae* herein request that the Supreme Court grant the City of Portland's petition for writ of *certiorari* and review this decision.

I. The plain language of the Clean Water Act does not authorize citizen suits to enforce state-authored NPDES permit provisions which are outside the scope of the Clean Water Act.

The panel majority holds that "[t]he plain language of CWA § 505 [33 U.S.C. § 1365] authorizes citizens to enforce all permit conditions." 56 F.3d at 986. This directly conflicts with a prior Second Circuit holding that state-imposed NPDES permit requirements "which mandate a greater scope of coverage than that required by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365." *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2nd Cir. 1993).

The "plain language" of the citizen suit provision, in fact, only authorizes citizen enforcement of "a permit or condition thereof issued under section 1342 of this title, *which is in effect under this chapter.*" 33 U.S.C.A. § 1365 (a)(1)(ii)(A), (f)(6) (West 1986 & Supp. 1996) (emphasis added).[2] While states, pursuant to their police power, may include their own requirements in an NPDES permit (such as requirements concerning a general duty to comply with state water quality standards), in addition to the Clean Water Act's requirements,

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1900 (1994), is set forth in the City of Portland's petition, pages 6 and 7 and 21 through 23.

[2]The majority opinion omits the critical language italicized above from its discussion of the "plain language." 56 F.3d at 986.

such additional requirements should not be enforceable in federal court via citizen suit. Under EPA's regulations, "[i]f an approved State [NPDES] program has greater scope of coverage than required by Federal law *the additional coverage is not part of the Federally approved program*," 40 C.F.R. § 123.1(i)(2) (1995) (emphasis added), and thus is not "in effect under this chapter" as that term is used in section 1365(f)(6). The new majority opinion overlooks these regulations and the prior holding of the Second Circuit.

II. Interpreting the Clean Water Act to authorize citizen suits to enforce compliance with state water quality standards imposes a great hardship on California municipalities and other NPDES permittees.

The achievement of state water quality standards is an ambitious and often elusive goal. As recognized in the panel's original opinion, the quality of receiving water often depends upon factors well beyond an individual permittee's control, including natural conditions, the weather, and third parties' intentional and unintentional discharges. 11 F.3d at 910. For this reason, it is fundamental that state water quality standards must be translated into specific NPDES permit requirements, which are the federally enforceable obligations imposed under the Clean Water Act.[3]

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[3]*See*, *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S.Ct. at 1911 [explaining that the "open-ended criteria" in a state's water quality standards "must be translated into specific limitations for individual projects"]; *American Paper Inst. v. EPA*, 996 F.2d 346, 349-353 (D.C. Cir. 1993) [upholding EPA rule requiring the translation of narrative water quality standards into specific NPDES effluent limitations]; *Oregon Natural*

In California, NPDES permits take the form of "waste discharge requirements" issued by one of the Regional Water Quality Control Boards ("Regional Boards") pursuant to section 13263 of the California Water Code. The Regional Boards have the authority to include in such waste discharge requirements (and, consequently, in NPDES permits) regulations relating to activities not covered by the Clean Water Act, such as nonpoint sources of pollution and groundwater pollution. *See*, 2 K. Manaster & D. Selmi, *California Environmental Law and Land Use Practice*, § 31.07 (rev. 1996) [comparing California's water quality law to the federal Clean Water Act].

Although broader than federal law, California water quality law does not authorize citizen suits to enforce its stricter requirements. Rather, California law provides an extensive administrative enforcement process, which must be followed before seeking judicial review in California state courts. *See*, Cal. Water Code §§ 13263(e), 13320, 13323-13325, 13330 (West 1992 & Supp. 1996). The Ninth Circuit's opinion in this case, however, opens the federal courtroom door to litigants who would seek to circumvent this process by going straight to federal court to enforce state regulations.

The new majority agrees that water quality standards are not directly enforceable via citizen suit if they are not included in an NPDES permit, but holds that citizens can sue to enforce them if they *are* included in the permit. 56 F.3d at 989, n. 11. The enforceability of water quality standards in federal court should not turn on this distinction. A state may

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Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) ["[I]t is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards."].

choose to include in an NPDES permit general language requiring maintenance of water quality standards to preserve *its own* inherent police power authority to impose additional pollution control or monitoring requirements on a permittee located in an area of water quality impairment.[4] Such a decision need not serve as a license for flooding the federal courts with citizens' suits against municipalities that are otherwise meeting all of the specific permit requirements mandated by the Clean Water Act.

The problem of allowing citizens' groups to bring actions in federal court concerning violation of state water quality standards is particularly acute for municipal operators of stormdrain facilities. The Clean Water Act requires NPDES permits for stormwater discharges, which contain specific federally enforceable requirements to implement measures to minimize pollutants in runoff. 33 U.S.C.A. § 1342(p)(3)(B) (West Supp. 1996). Yet, no matter how many times streets are cleaned and storm drains inspected, municipalities have no control over the weather and only limited control over the pollutants conveyed in stormwater runoff, or over what a private person may illicitly dump into a storm inlet. However, under the new majority's holding, a city may nonetheless be exposed to costly litigation in federal court and Clean Water Act-authorized penalties of up to $25,000 per occurrence

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[4]*See, EPA v. California*, 426 U.S. 200, 204-205 (1976) [explaining that, under the Clean Water Act, "a discharger's performance is now measured against strict technology-based effluent limitations--specified levels of treatment--to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform," with the standards serving only "as a supplementary basis" authorizing states to impose any "further regulat[ions]" necessary to meet the standards].

anytime a discharge from a stormdrain causes water quality standards to be exceeded.

The new majority's holding that all NPDES permit conditions are enforceable via citizen suit places an undue burden on *amici* herein, *as NPDES permits issued to municipalities within California (including permits for stormwater discharges) often include State-imposed language requiring that discharges should not cause water quality violations.* Many of the *amici* have NPDES permits containing such language.

In sum, so long as an NPDES permittee complies with the specific federally-mandated requirements of its permit, it should not be subject to federal citizens' suits under the Clean Water Act.

CONCLUSION

For the reasons set for above, *amici curiae* herein urge this Court to grant the City of Portland's petition for writ of *certiorari*.

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May __, 1996

No. ___ - _____

In the
Supreme Court of the United States

October Term, 1995

CITY OF PORTLAND,

Petitioner

vs.

NORTHWEST ENVIRONMENTAL ADVOCATES, a Non-Profit Oregon Corporation, and NINA BELL,

Respondents.

Petition for Writ of Certiorari
From the United States Court of Appeals
for the Ninth Circuit

Consent of Parties to the Filing of Amicus Brief

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Appendix A

The Parties to this action hereby consent to the filing of a joint amicus brief of up to 10 pages in support of Petitioner City of Portland's Petition for Writ of *Certiorari* From the United States Court of Appeals for the Ninth Circuit by approximately 75 California cities, towns, and other local public agencies, by the Santa Clara Valley Nonpoint Source Pollution Control Program, and by the California Association of Sanitation Agencies.

Dated: 4-15-96

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[illegible]

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No. 95-1732

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In The

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October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE OREGON ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Oregon Association of Clean Water Agencies (ACWA) is an Oregon nonprofit corporation. Of ACWA's 76 members, 63 are Oregon cities and other public agencies providing municipal sewage treatment and disposal. ACWA's 64 public member agencies have a population of at least 1,691,855 which is about 54% of Oregon's population of 3,132,000.

ACWA was formed to initiate and participate in the development of sound environmental policies; to promote public awareness and education; and to promote interagency coordination, assistance and partnership in order to fulfill a shared vision of water quality protection. It is ACWA's policy to provide legal assistance in the form of *amicus curiae* briefs, or otherwise, when the issue involved significantly affects a range of members and a favorable outcome would further the interests of ACWA as a whole.

ACWA's members have a vital interest in the proper interpretation and application of the Clean Water Act, 33 U.S.C. §1251, *et seq.* (CWA) because they operate their sewage treatment facilities pursuant to National Pollutant Discharge Elimination System (NPDES) permits issued by the Oregon Department of Environmental Quality (DEQ) and approved by the United States Environmental Protection Agency (EPA).

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[1] This brief is being filed with the written consent of the parties pursuant to Rule 37.2. The consents of the parties are being filed separately with the Clerk of the Court.

The NPDES permit system subjects publicly owned treatment works (POTWs) to a complex array of requirements including, but not limited to, specific effluent limitations, general water quality standards, sludge disposal, ground water protection, infiltration and inflow reduction, mixing zones, industrial pretreatment programs and extensive monitoring and reporting requirements, to name a few. Many of these requirements are based on difficult scientific and engineering judgments regarding the probable effect of different pollutant loads on receiving waters and the likelihood of being able to achieve those loads.

The planning, design, siting and construction of municipal sewage treatment plants to meet the NPDES permit requirements is a long, often arduous and always expensive process. Therefore, POTWs are usually designed to serve their communities for periods of 20 years or more. In the last 20 years, ACWA's members and other Oregon public agencies have spent more than $1,200,000,000 for the construction and upgrading of sewage treatment facilities to protect Oregon's rivers and streams. Nationwide, federal, state and local governments invested more than $128,000,000,000 from 1972 to 1989 in municipal treatment sewage facilities. *Alder, Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973, 1106 n. 118 (1995).

The decision below – which holds that a citizens suit may be brought to enforce general water quality standards which have not been translated into end-of-pipe effluent limitations – undermines the reliability of NPDES permits as sources of guidance for sewage treatment plant construction and operation; disrupts long term

municipal financial planning; and raises the specter of financial instability for many communities. This is of enormous concern to ACWA's members, who now find themselves subject to a different interpretation of the CWA simply because they are located within the jurisdiction of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Petition should be granted to eliminate conflict among the circuits; to settle an important federal question that the Ninth Circuit has decided based on a misapplication of a decision of this Court; and to restore the CWA's crucial balance between the reliability of NPDES permits and enforcement.

ARGUMENT

A. The decision below creates a conflict in the circuits.

It is unnecessary to reiterate the City of Portland's (Portland) explanation of how the decision below conflicts with the decisions of the Second Circuit in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), cert. denied, ___ U.S. ___ 115 S. Ct. 62, 130 L.Ed.2d 19 (1994) and *United States v. Hooker Chemicals and Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), which hold that CWA citizens suits may be brought only to enforce specific effluent standards or limitations. However, it is important to emphasize that prior to the decision in this case, no court had interpreted the CWA to allow the enforcement of general water quality standards through

citizens suits. *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 991 (1995) (Kleinfeld, J., dissenting), (NWEA II); *Northwest Environmental Advocates v. City of Portland*, 74 F.3d 945, 948 (1996) (O'Scannlain, J., dissenting from order denying Portland's petition for rehearing).

The decision below even conflicts with the Ninth Circuit's prior decision in *Oregon Natural Resources Council v. United States Forest Service*, 84 F.2d 842 (9th Cir. 1987) wherein the court stated that the limitations necessary to meet water quality standards rather than the water quality standards themselves are what may be enforced in a CWA citizens suit under 33 U.S.C. §1365. *Id.* at 850.

B. The decision below misapplies a prior ruling of this Court.

The linchpin of the rationale for withdrawing the court's original decision was that *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994)

> cast into considerable doubt our holding . . . that citizens do not have standing under the Clean Water Act to enforce water quality standards unless they have been translated into end-of-pipe effluent limitations.

NWEA II, 56 F.3d at 981. However, as was pointed out in Judge Kleinfeld's dissent:

> *Jefferson County* does not involve a citizen's suit, says nothing about citizen's suits and implies nothing about citizen's suits. *Id.* at 990.

C. The decision below upsets the CWA's balance between reliability of NPDES permits and enforcement.

The NPDES permit system is a complex process pursuant to which EPA or delegated state agencies, such as DEQ, issue permits allowing POTWs (and other entities) to discharge wastes into receiving waters subject to the effluent limits and other conditions set forth in the permits. The CWA sets out a general framework based on achieving minimum numerical technology based effluent limitations; requiring the states to designate the beneficial uses of receiving waters and establish general water quality standards therefor; and establishing a permit issuance and enforcement system to ensure protection of the quality of receiving waters.

Oregon Administrative Rules (OAR) Chapter 340, Division 41 sets forth DEQ's plan for managing water quality in Oregon. It sets out general policies that restrict degradation of surface waters; require all POTWs to develop long term financing plans to address wastewater needs; and provide an implementation program applicable to all 19 basins in Oregon. OAR 340-41-005 through 340-41-150. The rules also designate beneficial uses, general water quality standards and minimum design criteria for treatment and control of wastes on a basin-by-basin basis. OAR 340-41-202 through 340-41-975. General water quality standards are set separately for each basin and include dissolved oxygen, temperature, turbidity, pH, bacteria and total dissolved solids, among others. The minimum POTW design criteria set forth numerical effluent limitations which must be achieved based on the more stringent of CWA or Oregon requirements. *See, e.g.*,

OAR 340-41-442 through 340-41-470 which set the standards for the Willamette Basin in which Portland and many other ACWA members are located.

The plan is implemented through a permit and enforcement system which prohibits any discharge other than pursuant to a permit issued by DEQ and approved by EPA. OAR 340-41-120(1).

In the last 20 years, Oregon's communities have spent more than $1,200,000,000 building and upgrading their sewage treatment facilities to meet state and federal standards. In 1990, EPA projected the need to spend $110,000,000,000 nationally to meet sewage treatment needs through the year 2010. *Alder, Addressing Barriers to Watershed Protection, supra,* 25 Envtl. L. 973, 1106 n. 118 (1995).

> Given the extreme cost of pollution abatement, industry and cities must have the ability to plan for the future with the assurance that if they remain within their concrete permit parameters, they will remain on the correct side of the law.

Northwest Environmental Advocates v. City of Portland, 11 F.3d 900, 911 (9th Cir. 1993) (NWEA I).

Municipal treatment facilities are a combination of mechanical, biological and chemical processes to remove pollutants from wastewater before discharging it to the receiving waters. Engineers can design such facilities to achieve removal pollutant rates sufficient to comply with specific effluent limits. They cannot design to meet general water quality standards for changing conditions in

the receiving waters which are beyond the POTWs' control. Information on receiving water quality is not generally available on a frequent basis. More importantly, the quality of the receiving waters depends to a large degree on changing natural conditions and the effects of other point and nonpoint discharges over which the permittee has no control.

For example, while a permittee can plan, design, construct and operate facilities to control the levels of dissolved oxygen, bacteria, turbidity and pH of its effluent, it cannot control those levels in the receiving waters. It is just those levels which determine general water quality. *See, e.g.*, OAR 340-41-445(2)(a), (c), (d) and (e).

Allowing citizens suits to enforce general water quality standards as the Ninth Circuit has done here will necessarily make the federal courts rather than EPA and state regulatory agencies the primary "agency" setting discharge standards for this nation's POTWs. Such a role for the federal courts has already been rejected by this Court. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 320, 101 S. Ct. 1784, 68 L.Ed.2d 114 (1981).

Conversely, citizen enforcement of specific numerical effluent limits will neither unduly burden the planning process nor the court system. Communities can and should plan their facilities to ensure that required pollutant levels in their effluent are achieved, and in this situation the courts are not called upon to determine whether ambiguous general standards have been exceeded due to the conduct of one permittee. In short, the difference in effect between the enforcement options for numerical effluent limits and general water quality

standards is the balance point between the ability to plan for, construct and operate treatment facilities which will satisfy regulatory requirements and financial chaos.

A ruling that citizens cannot sue to enforce general water quality standards neither creates an anomaly under the CWA nor leaves our nation's waters unprotected. The permit condition at issue here provides that notwithstanding the permit's effluent limits, Portland cannot discharge wastes which violate water quality standards except in the mixing zone. The same condition is in every NPDES permit issued by DEQ to POTWs in Oregon. The condition's reach is obviously not restricted to combined sewer overflows (CSOs).[2] Notably, neither the CWA nor its implementing regulations require such a restrictive condition. This condition is imposed by DEQ as one of the more stringent optional requirements states may impose under the CWA. 33 U.S.C. §1342(b). Indeed this condition is not part of the federal enforcement program. 40 C.F.R. §123.1(i)(2). Accordingly, there is no reason it should be subject to enforcement through the citizens suit provision of the CWA. *Eastman Kodak Co.*, 12 F.3d at 359. However, enforcement of such provisions may be sought through either state regulatory agencies or EPA. *Id.*, 33 U.S.C. §1342(h).

The availability of enforcement by the regulatory agencies provides the oversight which produces the protection envisioned by the CWA. It is the regulatory agencies and their expert staffs with whom the permittees

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[2] Of the 239 cities in Oregon, only 11 have combined sanitary and storm water sewers.

interact most in the permit issuance process. As a result, they are in a much better position than private citizens to make the discretionary judgments which are necessary not only in the permit issuance process but at the enforcement stage.

> Water quality standards are a useful device for government enforcement authorities (who decided not to prosecute this case against the City of Portland), because they provide standards for effluent limitations and goals toward which enforcement should be aimed. They are too uncertain and amorphous, however, for use against specific polluters.

NWEA II, 56 F.3d at 992 (Kleinfeld, J., dissenting).

The estimated cost for correcting Portland's CSO problem is $500,000,000 to $1,200,000,000. Both DEQ and the citizen plaintiffs want the situation corrected. In the exercise of its discretion, DEQ allowed Portland a period of several years to redress the problem. During that time, Portland will have the opportunity to raise and spend the money to do it with as little financial disruption as possible. The practical effect of the citizens suit, however, would be to use the federal courts to require Portland to address the CSO problem without regard to other pressing needs it may face. The CWA does not require such a remedy and the federal courts should not, at the behest of citizens, stray into this arena and impose such a remedy absent a clear mandate by Congress. If the federal courts allow citizens to sue to enforce general water quality standards, they may be besieged by citizens suits demanding the impossible from cities who neither have the funds nor the ability to solve general water quality

problems for which they are neither the sole nor the primary cause. As Judge O'Scannlain aptly put it:

> While state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements, they should not be used as a vehicle for flooding the federal courts with citizens suits against permittees who are meeting the specific requirements (i.e., effluent limitations) outlined in their permits.

Northwest Environmental Advocates v. City of Portland, 74 F.3d at 946.

D. Citizens are not left without a significant remedy.

The federal regulatory scheme requires that NPDES permits contain numerous provisions such as technology-based effluent limits, standards for sewage sludge disposal, reopener clauses and other effluent limitations to control all pollutants which have a reasonable potential to cause an exceedence of any state water quality standard. 40 C.F.R. §122.44(a), (b)(1), (c) and (d)(1)(i). It also establishes an elaborate permit issuance process in which the public is given ample opportunity to participate. 40 C.F.R. §124. A regulatory agency must give public notice that a draft permit has been prepared and allow a minimum of 30 days for public comment. Minimum standards are set for the contents of all public notices. 40 C.F.R. §124.10(a)(1)(ii), (b) and (d). The public notice must include a copy of a fact sheet containing extensive information related to the nature of the proposed permit, the wastes to be discharged, the basis for permit conditions,

the dates for the public comment period and the procedures for requesting a hearing. 40 C.F.R. §124.8 and §124.10(e). A public hearing is required any time there is "a significant degree of public interest in a draft permit." 40 C.F.R. §124.12(a). Finally, a written response is required to public comments on the issuance of a final permit. 40 C.F.R. §124.17. These requirements as well as many others are made applicable to state programs pursuant to 40 C.F.R. §123.25.

Oregon's rules for the issuance of NPDES permits are set forth at OAR 340-45-035. As required by the federal regulations, these rules provide for public notice, comment periods, preparation and distribution of fact sheets, public hearings and responses to public comments. OAR 340-45-035(3)(a) and (b), (4), (6), (7) and (8). The Oregon rules also provide that the expected impact on the water quality of the receiving waters must be specifically addressed. OAR 340-45-035(3) and (4). Perhaps most notably for the purposes of this case, if a member of the public is dissatisfied with the terms of the permit, an action may be filed in the state courts under Oregon's Administrative Procedures Act. ORS 183.484(1) and (2). The state courts have the authority to affirm, reverse or remand the permit. ORS 183.484(4). Successful citizen plaintiffs may even recover their reasonable attorney fees and costs in such actions. ORS 183.497(1).

The existing process provides numerous avenues for citizens' input and to challenge decisions in the state courts. There is no reason for the federal courts then, to read into the CWA a requirement that citizens may bring a federal court suit based on an alleged violation of general water quality standards.

CONCLUSION

The CWA's authority for citizens suits is limited to the enforcement of specific effluent standards established by the appropriate regulatory agency to protect water quality. It does not extend to claimed violations of general water quality standards where the permittee has complied with the specific effluent limitations in its permit. The decision below creates a conflict in the circuits and misapplies a prior decision of this Court. Moreover, it upsets the delicate balance between the reliability of NPDES permits and enforcement.

This case is not just about CSO problems. Under *NWEA II*, every general water quality standard established by a state gives rise to a potential citizens suit. Thus, the decision raises the specter that the long term financial plans of every city in Oregon and in the Ninth Circuit, may be severely undermined. American cities have many pressing needs of which the protection of water quality is one. They should be able to plan, construct and operate sewage treatment works in reliance on the effluent limits established in their discharge permits without disruption by the unwarranted expansion of federal court jurisdiction sanctioned by the Ninth Circuit in this case. The limited financial resources of our nation's cities should not become a pawn in the battle between regulatory agencies and dissatisfied citizens regarding the perniciousness of the effect of permitted discharges on amorphous water quality standards. The petition for

certiorari should be granted and the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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183.484 Jurisdiction for review of orders other than contested cases; procedure; scope of court authority. (1) Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office.

(4)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(A) Set aside or modify the order; or

(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

(A) Outside the range of discretion delegated to the agency by law;

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

(C) Otherwise in violation of a constitutional or statutory provision.

(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

* * *

183.497 Awarding costs and attorney fees when finding for petitioner. (1) In a judicial proceeding designated under subsection (2) of this section the court:

(a) May, in its discretion, allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner.

(b) Shall allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner and determines that the state agency acted without a reasonable basis in fact or in law; but the court may withhold all or part of the attorney fees from any allowance to a petitioner if the court finds that the state agency has proved that its action was substantially justified or that special circumstances exist that make the allowance of all or part of the attorney fees unjust.

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WATER POLLUTION

DIVISION 41

STATE-WIDE WATER QUALITY MANAGEMENT PLAN; BENEFICIAL USES, POLICIES, STANDARDS, AND TREATMENT CRITERIA FOR OREGON

Preface

340-41-001 (1) The rules which follow, together with the applicable laws of the State of Oregon and the applicable regulations of the Environmental Quality Commission, set forth Oregon's plans for management of the quality of public waters within the State of Oregon.

(2) Under this plan, the Department of Environmental Quality will continue to manage water quality by evaluating each discharge and activity, whether existing or a new proposal, on a case-by-case basis, based on best information currently available and within the limiting framework of minimum standards, treatment criteria, and policies which are set forth in the plan.

(3) The EQC recognizes that the deadlines for adoption of this plan prevented thorough involvement by local government in the development and review of the plan. Accordingly, the Department will review the contents of this plan with affected local governments and will use their comments and suggestions in preparing amendments for consideration by the EQC not later than December, 1977. At a minimum, the processes of coordination with local governments will consist of the following elements:

(a) Work with county coordinators to set up meetings to explain the plan to groups of local governments and solicit their comments;

(b) Provide copies of the plan and supporting documents to any affected local governments who have not already received them;

(c) Seek input from councils of governments;

(d) Upon request, visit local level governments to discuss the plan;

(e) Work with statewide associations of local governments and others to inform local governments of the plan.

(1) "BOD" means five-day 20° C. Biochemical Oxygen Demand.

(2) "DEQ" or "Department" means the Oregon State Department of Environmental Quality.

(3) "DO" means dissolved oxygen.

(4) "EQC" or "Commission" means the Oregon State Environmental Quality Commission.

(5) "Estuarine waters" means all mixed fresh and oceanic waters in estuaries or bays from the point of oceanic water intrusion inland to a line connecting the outermost points of the headlands or protective jetties.

(6) "Industrial Waste" means any liquid, gaseous, radioactive, or solid waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business, or from the development or recovery of any natural resources.

(7) "Marine Waters" means all oceanic, offshore waters outside of estuaries or bays and within the territorial limits of the State of Oregon.

(8) "Mg/l" means milligrams per liter.

(9) "Pollution" means such contamination or other alteration of the physical, chemical, or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt, or odor of the waters, or such radioactive or other substance into any waters of the state which either by itself or in connection with any other substance present, will or can reasonably be expected to create a public nuisance or render such waters harmful, detrimental, or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life, or the habitat thereof.

(10) "Public Water" means the same as "waters of the state".

(11) "Sewage" means the water-carried human or animal waste from residences, buildings, industrial establishments, or other places together with such groundwater infiltration and surface water as may be present. The admixture with sewage as herein defined of industrial wastes or wastes, as defined in sections (6) and (13) of this rule, shall also be considered "sewage" within the meaning of this division.

(12) "SS" means suspended solids.

(13) "Wastes" means sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive, or other substances which will or may cause pollution or tend to cause pollution of any water of the state.

(14) "Waters of the State" include lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon, and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.

(15) "Low Flow Period" means the flows in a stream resulting from primarily groundwater discharge or baseflows augmented from lakes and storage projects during the driest period of the year. The dry weather period varies across the state according to climate and topography. Wherever the low flow period is indicated in the Water Quality Management Plans, this period has been approximated by the inclusive months. Where applicable in a waste discharge permit, the low flow period may be further defined.

(16) "Secondary Treatment" as the following context may require for:

(a) "Sewage wastes" means the minimum level of treatment mandated by EPA regulations pursuant to Public Law 92-500;

(b) "Industrial and other waste sources" imply control equivalent to best practicable treatment (BPT).

(17) "Nonpoint Sources" refers to diffuse or unconfined sources of pollution where wastes can either enter into – or be conveyed by the movement of water to – public waters.

(18) "Loading Capacity (LC)" – The greatest amount of loading that a water can receive without violating water quality standards.

(19) "Load Allocation (LA)" – The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting loading. Whenever possible, natural and nonpoint source loads should be distinguished.

(20) "Wasteload Allocation (WLA)" – The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(21) "Total Maximum Daily Load (TMDL)" – The sum of the individual WLAs for point sources and LAs for nonpoint sources and background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background

sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste-load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

(22) "Land Development" refers to any human induced change to improved or unimproved real estate, including but not limited to construction, installation or expansion of a building or other structure, land division, drilling, and site alteration such as that due to land surface mining, dredging, grading, construction of earthen berms, paving, improvements for use as parking or storage, excavation or clearing.

(23) "Jurisdiction" refers to any city or county agency in the Tualatin River and Oswego Lake subbasins that regulates land development activities within its boundaries by approving plats, site plans or issuing permits for land development.

(24) "Erosion Control Plan" shall be a plan containing a list of best management practices to be applied during construction to control and limit soil erosion.

(25) "Public Works Project" means any land development conducted or financed by a local, state, or federal governmental body.

(26) "Stormwater Quality Control Facility" refers to any structure or drainage way that is designed, constructed, and maintained to collect and filter, retain, or

detain surface water runoff during and after a storm event for the purpose of water quality improvement. It may also include, but not be limited to, existing features such as wetlands, water quality swales, and ponds which are maintained as stormwater quality control facilities.

(27) "Water Quality Swale" is a natural depression or wide shallow ditch use to temporarily store, route, or filter runoff for the purpose of improving water quality.

(28) "In Lieu Fee" means a fee collected by a jurisdiction in lieu of requiring construction of onsite stormwater quality control facilities.

(29) "Effluent Limited" can mean one of the following categories:

(a) A receiving stream which is meeting and/or is expected to meet water quality standards with the implementation of standard treatment technology which is secondary treatment for sewage wastes and best practicable treatment (BPT) for industrial and other waste sources;

(b) A receiving stream for which there is insufficient information to determine if water quality standards are being met with standard treatment technology.

(30) "Water Quality Limited" can mean one of the following categories:

(a) A receiving stream which does not meet instream water quality standards during the entire year or defined season even after the implementation of standard technology;

(b) A receiving stream which achieves and is expected to continue to achieve instream water quality

standard but utilizes higher than standard technology to protect beneficial uses;

(c) A receiving stream for which there is insufficient information to determine if water quality standards are being met with higher than standard treatment technology or where through professional judgment the receiving stream would not be expected to meet water quality standards during the entire year or defined season without higher than standard technology.

(31) "Reserve Capacity" means that portion of a receiving stream's loading capacity which has not been allocated to point sources or nonpoint sources and natural background as waste load allocations or load allocations, respectively. The reserve capacity includes that loading capacity which has been set aside for a safety margin and is otherwise unallocated.

(32) "Aquatic Species" means any plants or animals which live at least part of their life cycle in waters of the State.

(33) "Biological Criteria" means numerical values or narrative expressions that describe the biological integrity of aquatic communities inhabiting waters of a given designated aquatic life use.

(34) "Designated Beneficial use" means the purpose or benefit to be derived from a water body, as designated by the Water Resources Department or the Commission.

(35) "Indigenous" means supported in a reach of water or known to have been supported according to historical records compiled by State and Federal agencies or published scientific literature.

(36) "Resident Biological Community" means aquatic life expected to exist in a particular habitat water quality standards for a specific ecoregion, basin, or water body are met. This shall be established by accepted biomonitoring techniques.

(37) "Without Detrimental Changes in the Resident Biological Community" means no loss of ecological integrity when compared to natural conditions at an appropriate reference site or region.

(38) "Ecological Integrity" means the summation of chemical, physical and biological integrity capable of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region.

(39) "Appropriate Reference Site or Region" means a site on the same water body, or within the same basin or ecoregion that has similar habitat conditions, and represents the water quality and biological community attainable within the areas of concern.

(40) "Critical Habitat" means those areas which support rare, threatened or endangered species, or serve as sensitive spawning and rearing areas for aquatic life.

(41) "High Quality Waters" means those waters which meet or exceed those levels that are necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water, and other designated beneficial uses.

(42) "Outstanding Resource Waters" means those waters designated by the Environmental Quality Commission where existing high quality waters constitute an outstanding state or national resource based on their extraordinary water quality or ecological values, or where special water quality protection is needed to maintain critical habitat areas.

(43) "Short-Term Disturbance" means a temporary disturbance where water quality standards may be violated briefly, but not of sufficient duration to cause acute or chronic effects on beneficial uses.

Stat. Auth: ORS 183.500, 468.020, 468.705, 468.710 & 468.735

Policies and Guidelines Generally Applicable to All Basins

340-41-026 (1) In order to maintain the quality of waters in the State of Oregon, the following is the general policy of the EQC:

(a) Antidegradation Policy for Surface Waters. The purpose of the Antidegradation Policy is to guide decisions that affect water quality such that unnecessary degradation from point and nonpoint sources of pollution is prevented, and to protect, maintain, and enhance existing surface water quality to protect all existing beneficial uses. The standards and policies set forth in OAR 340-41-120 through 340-41-962 are intended to implement the Antidegradation Policy:

(A) High Quality Waters Policy: Where existing water quality meets or exceeds those levels necessary to

support propagation of fish, shellfish, and wildlife and recreation in and on the water, and other designated beneficial uses, that level of water quality shall be maintained and protected. The Environmental Quality Commission, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, and with full consideration of sections (2), (3) and (5) of this rule, however, may allow a lowering of water quality in these high quality waters if they find:

(i) No other reasonable alternatives exist except to lower water quality; and

(ii) The action is necessary and justifiable for economic or social development benefits and outweighs the environmental costs of lowered water quality; and

(iii) All water quality standards will be met and beneficial uses protected.

(B) The Director or a designee may allow lower water quality on a short term basis in order to respond to emergencies or to otherwise protect public health and welfare;

(C) Water Quality Limited Waters Policy: For water quality limited waterbodies, the water quality shall be managed as described in section (3) of this rule;

(D) Outstanding Resource Waters Policy: Where existing high quality waters constitute an outstanding state or national resource such as those waters designated as extraordinary resource waters, or as critical habitat areas, the existing water quality and water quality values

shall be maintained and protected, and classified as "Outstanding Resource Waters of Oregon". The Commission may specially designate high quality waterbodies to be classified as Outstanding Resource Waters in order to protect the water quality parameters that affect ecological integrity of critical habitat or special water quality values that are vital to the unique character of those waterbodies. The Department will develop a screening process and establish a list of nominated waterbodies for Outstanding Resource Waters designation in the Biennial Water Quality Status Assessment Report (305(b) Report). The priority waterbodies for nomination include:

(i) National Parks;

(ii) National Wild and Scenic Rivers;

(iii) National Wildlife Refuges;

(iv) State Parks; and

(v) State Scenic Waterways.

(E) The Department will bring to the Commission a list of waterbodies which are proposed for designation as Outstanding Resource Waters at the time of each Triennial Water Quality Standards Review.

(F) In designating Outstanding Resource Waters, the Commission shall establish the water quality values to be protected and provide a process for determining what activities are allowed that would not affect the outstanding resource values. After the designation, the Commission shall not allow activities that may lower water quality below the level established except on a short term basis to respond to emergencies or to otherwise protect human health and welfare.

(b) Point source discharges shall follow policies and guidelines in sections (2), (5), and (6) of this rule, and nonpoint source activities shall follow guidelines in sections (7), (8), (9), (10), and (11) of this rule.

(2) In order to maintain the quality of waters in the State of Oregon, it is the general policy of the EQC to require that growth and development be accommodated by increased efficiency and effectiveness of waste treatment and control such that measurable future discharged waste loads from existing sources do not exceed presently allowed discharged loads except as provided in section (3) of this rule.

(3) The Commission or Department may grant exceptions to sections (2) and (6) of this rule and approvals to section (5) of this rule for major dischargers and other dischargers, respectively. Major dischargers include those industrial and domestic sources that are classified as major sources for permit fee purposes in OAR 340-45-075(2):

(a) In allowing new or increased discharged loads, the Commission or Department shall make the following findings:

(A) The new or increased discharged load would not cause water quality standards to be violated;

(B) The new or increased discharge load would not unacceptably threaten or impair any recognized beneficial uses. In making this determination, the Commission or Department may rely upon the presumption that if the numeric criteria established to protect specific uses are met the beneficial uses they were designed to protect are

protected. In making this determination the Commission or Department may also evaluate other state and federal agency data that would provide information on potential impacts to beneficial uses for which the numeric criteria have not been set;

(C) The new or increased discharged load shall not be granted if the receiving stream is classified as being water quality limited under OAR 340-41-006(30)(a), unless:

(i) The pollutant parameters associated with the proposed discharge are unrelated either directly or indirectly to the parameter(s) causing the receiving stream to violate water quality standards and being designated water quality limited; or

(ii) Total maximum daily loads (TMDLs), waste load allocations (WLAs) load allocations (LAs), and the reserve capacity have been established for the water quality limited receiving stream; and compliance plans under which enforcement action can be taken have been established; and there will be sufficient reserve capacity to assimilate the increased load under the established TMDL at the time of discharge; or

(iii) Under extraordinary circumstances to solve an existing, immediate, and critical environmental problem that the Commission or Department may consider a waste load increase for an existing source on a receiving stream designated water quality limited under OAR 340-41-006(30)(a) during the period between the establishment of TMDLs, WLAs and LAs and their achievement based on the following conditions:

(I) That TMDLs, WLAs and LAs have been set; and

(II) That a compliance plan under which enforcement actions can be taken has been established and is being implemented on schedule; and

(III) That an evaluation of the requested increased load shows that this increment of load will not have an unacceptable temporary or permanent adverse effect on beneficial uses; and

(IV) That any waste load increase granted under subparagraph (iii) of this paragraph is temporary and does not extend beyond the TMDL compliance deadline established for the waterbody. If this action will result in a permanent load increase, the action has to comply with subparagraphs (i) or (ii) of this paragraph.

(D) The activity, expansion, or growth necessitating a new or increased discharge load is consistent with the acknowledged local land use plans as evidenced by a statement of land use compatibility from the appropriate local planning agency.

(b) Oregon's water quality management policies and programs recognize that Oregon's water bodies have a finite capacity to assimilate waste. Unused assimilative capacity is an exceedingly valuable resource that enhances in-stream values specifically, and environmental quality generally. Allocation of any unused assimilative capacity should be based on explicit criteria. In addition to the conditions in subsection (a) of this section, the Commission or Department shall consider the following:

(A) Environmental Effects Criteria:

(i) Adverse Out-of-Stream Effects. There may be instances where the non-discharge or limited discharge alternatives may cause greater adverse environmental effects than the increased discharge alternative. An example may be the potential degradation of groundwater from land application of wastes;

(ii) Instream Effects. Total stream loading may be reduced through elimination or reduction of other source discharges or through a reduction in seasonal discharge. A source that replaces other sources, accepts additional waste from less efficient treatment units or systems, or reduces discharge loadings during periods of low stream flow may be permitted an increased discharge load year-round or during seasons of high flow, as appropriate;

(iii) Beneficial effects. Land application, upland wetlands application, or other non-discharge alternatives for appropriately treated wastewater may replenish groundwater levels and increase streamflow and assimilative capacity during otherwise low streamflow periods.

(B) Economic Effects Criteria. When assimilative capacity exists in a stream, and when it is judged that increased loading will not have significantly greater adverse environmental effects than other alternatives to increased discharge, the economic effect of increased loading will be considered. Economic effects will be of two general types:

(i) Value of Assimilative Capacity. The assimilative capacity of Oregon's streams are finite, but the potential uses of this capacity are virtually unlimited. Thus it is

important that priority be given to those beneficial uses that promise the greatest return (beneficial use) relative to the unused assimilative capacity that might be utilized. In-stream uses that will benefit from reserve assimilative capacity, as well as potential future beneficial use, will be weighed against the economic benefit associated with increase loading;

(ii) Cost of Treatment Technology. The cost of improved treatment technology, non-discharge and limited discharge alternatives shall be evaluated.

(4)(a) A receiving stream shall be designated as water quality limited through the biennial water quality status assessment report prepared to meet the requirements of Section 305(b) of the Water Quality Act. Appendix A of the Status Assessment report shall identify: What waterbodies are water quality limited, the time of year the water quality standards violations occur, the segment of stream or area of waterbody limited, the parameter(s) of concern, whether it is water quality limited under OAR 340-41-006(30)(a), (b) or (c). Appendix B and C of the Status Assessment report shall identify the specific evaluation process for designating waterbodies limited;

(b) The WQL list contained in Appendix A of the Status Assessment report shall be placed on public notice and reviewed through the public hearing process. At the conclusion of the hearing process and the evaluation of the testimony received, Appendix A will become the official water quality limited list. The Department may add a waterbody to the water quality limited list between status assessment reports after placing that action out on public notice and conducting a public hearing;

(c) For interstate waterbodies, the state shall be responsible for completing the requirements of section (3) of this rule for that portion of the interstate waterbody within the boundary of the state;

(d) For waterbodies designated WQL under OAR 340-41-006(30)(c), the Department shall establish a priority list and schedule for future water quality monitoring activities to determine; if the waterbody should be designated WQL under OAR 340-41-006(30)(a) or (b), if estimated TMDLs need to be prepared, and if an implementation plan needs to be developed and implemented;

(e) For waterbodies designated WQL under OAR 340-41-006(30)(b), requests for load increases shall be considered following subsection (3)(b) of this rule.

(5) For any new waste sources, alternatives which utilize reuse or disposal with no discharge to public waters shall be given highest priority for use wherever practicable. New source discharges may be approved subject to the criteria in section (3) of this rule.

(6) No discharges of wastes to lakes or reservoirs shall be allowed except as provided in section (3) of this rule.

(7) Log handling in public waters shall conform to current EQC policies and guidelines.

(8) Sand and gravel removal operations shall be conducted pursuant to a permit from the Division of State Lands and separated from the active flowing stream by a water-tight berm wherever physically practicable. Recirculation and reuse of process water shall be required

wherever practicable. Discharges, when allowed, or seepage or leakage losses to public waters shall not cause a violation of water quality standards or adversely affect legitimate beneficial uses.

(9) Logging and forest management activities shall be conducted in accordance with the Oregon Forest Practices Act so as to minimize adverse effects on water quality.

(10) Road building and maintenance activities shall be conducted in a manner so as to keep waste materials out of public waters and minimize erosion of cut banks, fills, and road surfaces.

(11) In order to improve controls over nonpoint sources of pollution, federal, state, and local resource management agencies will be encouraged and assisted to coordinate planning and implementation of programs to regulate or control runoff, erosion, turbidity, stream temperature, stream flow, and the withdrawal and use of irrigation water on a basin-wide approach so as to protect the quality and beneficial uses of water and related resources. Such programs may include, but not be limited to, the following:

(a) Development of projects for storage and release of suitable quality waters to augment low stream flow;

(b) Urban runoff control to reduce erosion;

(c) Possible modification of irrigation practices to reduce or minimize adverse impacts from irrigation return flows;

(d) Stream bank erosion reduction projects.

Biological Criteria

340-41-027 Waters of the state shall be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities.

Policy on Sewerage Works Planning and Construction

340-41-034 (1) Oregon's publicly owned sewerage utilities have since 1956 developed an increasing reliance on federal sewerage works construction grant funds to meet a major portion of the cost of their sewerage works construction needs. This reliance did not appear unreasonable based on federal legislation passed up through 1978. Indeed, the Environmental Quality Commission (EQC) has routinely approved compliance schedules with deadlines contingent on federal funding. This reliance no longer appears reasonable based on recent and proposed legislative actions and appropriations and the general state of the nation's economy.

(2) The federal funds expected for future years will address a small percentage of Oregon's sewerage works construction needs. Thus, continued reliance by DEQ and public agencies on federal funding for sewerage works construction will not assure that sewage from a growing Oregon population will be adequately treated and disposed of so that health hazards and nuisance conditions are prevented and beneficial uses of public waters are not threatened or impaired by quality degradation.

(3) Therefore, the following statements of policy are established to guide future sewerage works planning and construction:

(a) The EQC remains strongly committed to its historic program of preventing water quality problems by requiring control facilities to be provided prior to the connection of new or increased waste loads;

(b) The EQC urges each sewerage utility in Oregon to develop, as soon as practicable, a financing plan which will assure that future sewerage works construction, operation, maintenance and replacement needs can be met in a timely manner. Such financing plans will be a prerequisite to Department issuance of permits for new or significantly modified sewerage facilities, for approval of plans for new or significantly modified sewerage facilities, or for access to funding assistance from the state pollution control bond fund. The Department may accept assurance of development of such financing plan if necessary to prevent delay in projects already planned and in the process of implementation. The Department will work with the League of Oregon Cities and others as necessary to aid in the development of financing plans;

(c) No sewerage utility should assume that it will receive grant assistance to aid in addressing its planning and construction needs;

(d) existing sewerage facility plans which are awaiting design and construction should be updated where necessary to include:

(A) Evaluation of additional alternatives where appropriate, and re-evaluation of costs of existing alternatives;

(B) Identification and delineation of phased construction alternatives; and

(C) A financing plan which will assure ability to construct facilities over an appropriate time span with locally derived funds.

(e) New sewerage works facility planning initiated after October 1, 1981 should not be approved without adequate consideration of alternatives and phased construction options, and without a financing plan which assures adequate funding for construction, operation, maintenance and replacement of sewerage facilities:

(A) The EQC recognizes that many cities in need of immediate sewerage works construction have completed planning and are awaiting design or construction funding. These cities have developed their program relying on 75 percent federal grants. They will have difficulty developing and implementing alternatives to fund immediate construction needs. Many are, or will be, under moratoriums on new connections because existing facilities are at, or near, capacity. The EQC will consider the following interim measures as a means of assisting these cities to get on a self-supporting basis provided that an approvable long-range program is presented:

(i) Temporary increases in waste discharge loading may be approved provided a minimum of secondary treatment, or equivalent control is maintained and beneficial uses of the receiving waterway are not impaired;

(ii) Installation and operation of temporary treatment works may be approved providing:

(I) The area served is inside an approved urban growth boundary and the proposal is consistent with State Land Use Planning laws;

(II) A master sewerage plan is adopted which shows how and when the temporary facilities will be phased out;

(III) The public agency responsible for implementing the master plan is the owner and operator of the temporary facilities;

(IV) Sewerage service to the area served by the temporary facility is necessary as part of the financing program for master plan implementation and no other option for service is practicably available;

(V) An acceptable receiving stream or method of effluent disposal is available for the temporary facility.

(B) Compliance schedules and other permit requirements may be modified to incorporate an approved interim program. Compliance with a permit so modified will be required at all times.

(f) Sewerage Construction programs should be designed to eliminate raw sewage bypassing during the summer recreation season (except for a storm event greater than the one in ten year 24 hour storm) as soon as practicable. A program and timetable should be developed through negotiation with each affected source. Bypasses which occur during the remainder of the year should be eliminated in accordance with an approved longer term maintenance based correction program. More stringent schedules may be imposed as necessary to protect drinking water supplies and shellfish growing areas;

(g) Any sewerage utility that is presently in compliance and foresees a need to plan for future expansion to accommodate growth but elects to wait for federal funds

for planning and construction will make such election with full knowledge that if existing facilities reach capacity before new facilities are completed, a moratorium on new connections will be imposed. Such moratorium will not qualify them for any special consideration since its presence is deemed a matter of their choice;

(h) The Department will continue to assist cities to develop interim and long-range programs, and construction schedules and to secure financing for essential construction.

Special Water Quality Standards for Public Waters of Goose Lake in Lake County

340-41-035 [SA 26, f. 6-1-67; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for Public Waters of the Main Stem Klamath River

340-41-040 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for the Public Waters of Multnomah Channel and the Main Stem Willamette River

340-41-045 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Special Water Quality Standards for the Public Waters of the Main Stem of the Columbia River From the Eastern Oregon-Washington Border Westward to the Pacific Ocean

340-41-050 [SA 26, f. 6-1-67; DEQ 55, f. 7-2-73, ef. 7-15-73; Repealed by DEQ 128, f. & ef. 1-21-77]

Implementation Program Applicable to All Basins

340-41-120 (1) No waste treatment and disposal facilities shall be constructed or operated and no wastes shall be discharged to public waters without obtaining a permit from the Department as required by ORS 468.740.

(2) Plans for all sewage and industrial waste treatment, control, and disposal facilities shall be submitted to the Department for review and approval prior to construction as required by ORS 468.742.

(3) Minimum design criteria for waste treatment and control facilities prescribed under this plan and such other waste treatment and controls as may be necessary to insure compliance with the water quality standards contained in this plan shall be provided in accordance with specific permit conditions for those sources or activities for which permits are required and the following implementation program:

(a) For new or expanded waste loads or activities, fully approved treatment or control facilities, or both shall be provided prior to discharge of any wastes from the new or expanded facility or conduct of the new or expanded activity;

(b) For existing waste loads or activities, additional treatment or control facilities necessary to correct specific unacceptable water quality conditions shall be provided in accordance with a specific program and timetable incorporated into the waste discharge permit for the individual discharger or activity. In developing treatment requirements and implementation schedules for existing installations or activities, consideration shall be given to the impact upon the overall environmental quality including air, water, land use, and aesthetics;

(c) Wherever minimum design criteria for waste treatment and control facilities set forth in this plan are more stringent than applicable federal standards and treatment levels currently being provided, upgrading to the more stringent requirements will be deferred until it is necessary to expand or otherwise modify or replace the existing treatment facilities. Such deferral will be acknowledged in the permit for the source;

(d) Where planning or design or construction of new or modified waste treatment and controls to meet prior applicable state or federal requirements is underway at the time this plan is adopted, such plans, design, or construction may be completed under the requirements in effect when the project was initiated. Timing for upgrading to meet more stringent future requirements will be as provided in section (3) of this rule.

(6) Where minimum requirements of federal law or enforceable regulations are more stringent than specific provisions of this plan, the federal requirements shall prevail.

(9) The Department shall calculate and include effluent limits specified in pounds per day, which shall be the mass load limits for biochemical oxygen demand or carbonaceous biochemical oxygen demand and total suspended solids in National Pollutant Discharge Elimination System permits issued to all sewage treatment facilities. These limits shall be calculated as follows:

(a) Except as noted in paragraph (H) of this subsection, for existing facilities and for facilities receiving engineering plans and specifications approval from the Department for new treatment facilities or treatment facilities expanding the average dry weather treatment capacity, prior to June 30, 1992:

(A) During periods of low stream flows (approximately May 1 through October 31), the monthly average mass load expressed as pounds per day shall not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34 pounds per gallons. The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5. The daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0;

(B) During the period of high stream flows (approximately November 1 through April 30), the monthly average mass load expressed as pounds per day shall not exceed the monthly concentration effluent limit times the design average wet weather flow expressed in million gallons per day times 8.34 pounds per gallon. The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5. The

daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0;

(C) On any day that the daily flow to a sewage treatment facility exceeds the lesser hydraulic capacity of the secondary treatment portion of the facility or twice the design average dry weather flow, the daily mass load limit shall not apply. The permittee shall operate the treatment facility at highest and best practicable treatment and control;

(D) The design average wet weather flow used in calculating mass loads shall be approved by the Department in accordance with prudent engineering practice and shall be based on a facility plan approved by the Department, engineering plans and specifications approved by the Department, or an engineering evaluation. The permittee shall submit documentation describing and supporting the design average wet weather flow with the permit application, application for permit renewal, or modification request, or upon request by the Department. The design average wet weather flow is defined as the average flow between November 1 and April 30 when the sewage treatment facility is projected to be at design capacity for that portion of the year;

(E) Mass loads assigned as described in paragraphs (B) and (C) of this subsection will not be subject to OAR 340-41-026(3);

(F) Mass loads as described in this rule will be included in permits upon renewal, or upon permit modification request;

(G) Within 180 days after permit renewal or modification, permittees receiving higher mass loads under this rule and having a separate sanitary sewer system shall submit to the Department for review and approval a proposed program and time schedule for identifying and reducing inflow. The program shall consist of the following:

(i) Identification of all overflow points and verification that sewer system overflows are not occurring up to a 24-hour, five-year storm event or equivalent;

(ii) Monitoring of all pump station overflow points; and

(iii) A program for identifying and removing all inflow sources into the permittees sewer system over which the permittee has legal control; and

(iv) For those permittees not having the necessary legal authority for all portions of the sewer system discharging into the permittee's sewer system or treatment facility, a program and schedule for gaining legal authority to require inflow reduction and a program and schedule for removing inflow sources;

(v) Within one year after the Department's approval of the program, the permittee shall begin implementation of the program.

(H) Paragraphs (A) through (G) of this subsection shall not apply to the cities of Athena, Elgin, Adair Village, Halsey, Harrisburg, Independence, Carlton and Sweet Home. Mass load limits have been individually assigned to these facilities.

(b) For new sewage treatment facilities or treatment facilities expanding the average dry weather treatment capacity, and receiving engineering plans and specifications approval from the Department after June 30, 1992, the mass load limits shall be calculated by the Department based on the proposed treatment facility capabilities and the highest and best practicable treatment to minimize the discharge of pollutants;

(c) Mass load limits as defined in this rule may be replaced by more stringent limits if required by waste load allocations established in accordance with a TMDL for treatment facilities discharging to water quality limited streams, or if required to prevent or eliminate violations of water quality standards;

(d) In the event that the design average wet weather flow or the hydraulic secondary treatment capacity is not known or has not been approved by the Department at the time of permit issuance, the permit shall include as interim mass load limits the mass load limits in the previous permit issued to the permittee for the treatment facility. The permit shall also include a requirement that the permittee shall submit to the Department the design average wet weather flow and hydraulic secondary treatment capacity within 12 months after permit issuance. Upon review and approval of the design flow information, the department will modify the permit and include mass load limits as described in subsection (a) of this section;

(e) Each permittee with existing sewage treatment facilities otherwise subject to subsection (a) of this section may choose mass load limits calculated as follows:

(A) The monthly average mass load expressed as pounds per day shall not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34 pounds per gallon;

(B) The weekly average mass load expressed as pounds per day shall not exceed the monthly average mass load times 1.5;

(C) The daily mass load expressed in pounds per day shall not exceed the monthly average mass load times 2.0. In the event that existing mass load limits are retained by the permittee, the terms and requirements of subsection (a) of this section shall not apply.

(f) The Commission may grant exceptions to subsection (a) of this section. In allowing increased discharged loads, the Commission shall make the findings specified in OAR 340-41-026(3) for waste loads, and in addition shall make the following findings:

(i) That mass loads as calculated in subsection (a) of this section cannot be achieved with the existing treatment facilities operated at maximum efficiency at projected design flows; and

(ii) That there are no practicable alternatives to achieving the mass loads as calculated in subsection (a) of this section.

Nuisance Phytoplankton Growth

340-41-150 The following values and implementation program shall be applied to lakes, reservoirs, estuaries and streams, except for ponds and reservoirs less than ten acres in surface area, marshes and saline lakes:

(1) The following average Chlorophyll **a** values shall be used to identify water bodies where phytoplankton may impair the recognized beneficial uses:

(a) Natural lakes which thermally stratify: 0.01 mg/l;

(b) Natural lakes which do not thermally stratify, reservoirs, rivers and estuaries: 0.015 mg/l;

(c) Average Chlorophyll **a** values shall be based on the flowing methodology (or other methods approved by the Department): A minimum of three samples collected over any three consecutive months at a minimum of one representative location (e.g., above the deepest point of a lake or reservoir or at a point mid-flow of a river) from samples integrated from the surface to a depth equal to twice the secchi depth or the bottom (the lesser of the two depths); analytical and quality assurance methods shall be in accordance with the most recent edition of **Standard Methods for the Examination of Water and Wastewater.**

(2) Upon determination by the Department that the values in section (1) of this rule are exceeded, the Department shall:

(a) In accordance with a schedule approved by the Commission, conduct such studies as are necessary to describe present water quality; determine the impacts on beneficial uses; determine the probable causes of the exceedance and beneficial use impact; and develop a

proposed control strategy for attaining compliance where technically and economically practicable. Proposed strategies could include standards for additional pollutant parameters, pollutant discharge load limitations, and other such provisions as may be appropriate. Where natural conditions are responsible for exceedance of the values in section (1) of this rule or beneficial uses are not impaired, the values in section (1) of this rule may be modified to an appropriate value for that water body;

(b) Conduct necessary public hearings preliminary to adoption of a control strategy, standards or modified values after obtaining Commission authorization;

(c) Implement the strategy upon adoption by the Commission.

(3) In cases where waters exceed the values in section (1) of this rule and the necessary studies are not completed, the Department may approve new activities (which require Department approval), new or additional (above currently approved permit limits) discharge loadings from point sources provided that it is determined that beneficial uses would not be significantly impaired by the new activity or discharge.

[**Publications:** The publication(s) referred to or incorporated by reference in this rule are available from the Department of Environmental Quality.]

Willamette Basin

Beneficial Water Uses to be Protected

340-41-442 Water quality in the Willamette River Basin (see **Figures 1** and 7) shall be managed to protect the recognized beneficial uses as indicated in **Table 6.**

Water Quality Standards Not to be Exceeded (To be Adopted Pursuant to ORS 468.735 and Enforceable Pursuant to ORS 468.720, 468.990, and 468.992)

340-41-445 (1) Notwithstanding the water quality standards contained below, the highest and best practicable treatment and/or control of wastes, activities, and flows shall in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the Willamette River Basin:

(a) Dissolved oxygen (DO):

(A) Multnomah Channel and main stem Willamette River from mouth to the Willamette Falls at Oregon City, river mile 26.6: The DO concentrations shall not be less than 5 mg/l;

(B) Main stem Willamette River from the Willamette Falls to Newberg, river mile 50: The DO concentrations shall not be less than 6 mg/l;

(C) Main stem Willamette River from Newberg to Salem, river mile 85: The DO concentrations shall not be less than 7 mg/l;

(D) Main stem Willamette River from Salem to confluence of Coast and Middle Forks, river mile 187: The DO concentrations shall not be less than 90 percent of saturation;

(E) All other Willamette Basin streams:

(i) Salmonid fish producing waters: The DO concentration shall not be less than 90 percent of saturation at seasonal low or less than 95 percent of saturation in spawning areas during spawning, incubation, hatching, and fry stages of salmonid fishes;

(ii) Non-Salmonid fish producing waters: The DO concentration shall not be less than 6 mg/l.

(F) Columbia River (river mile 86 to 120): The DO concentration shall not be less than 90 percent of saturation.

* * *

(c) Turbidity (Nephelometric Turbidity Units, NTU): No more than a ten percent cumulative increase in natural stream turbidities shall be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration

activities necessary to address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

(A) Emergency activities: Approval coordinated by DEQ with the Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;

(B) Dredging, Construction or other Legitiamte Activities: Permit or certification authorized under terms of Section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 141-85-100 et seq. (Removal and Fill Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

(d) pH (hydrogen ion concentration): pH values shall not fall outside the following ranges:

(A) Columbia River: 7.0-8.5;

(B) All other basin waters: 6.5-8.5.

(e) Bacteria Standards:

(A) Effective upon filing and through June 30, 1995. Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples). Freshwaters: A log mean of 200 fecal coliform per 100 milliliters based on a minimum of five samples in a 30-day period with no more than ten percent of the samples in the 30-day period exceeding 400 per 100 ml.

(B) Effective July 1, 1995. Bacteria of coliform group associated with fecal sources and bacteria of the enterococci group (MPN or equivalent membrane filtration using a representative number of samples) shall not exceed the criteria values described in this paragraph. However, the Department may designate site-specific bacteria criteria on a case-by-case basis to protect beneficial uses. Site specific values shall be described in and included as part of a water quality management plan. Freshwaters: A geometric mean of 33 enterococci per 100 milliliters based on no fewer than five samples, representative of seasonal conditions, collected over a period of at least 30 days. No single sample should exceed 61 enterococci per 100 ml.

* * *

Issuance of NPDES Permtis

340-45-035 (1) Following determination that it is complete for processing, each application will be reviewed on its own merits. Recommendations will be developed in accordance with provisions of all applicable statutes, rules, regulations, and effluent guidelines of the State of Oregon and the U.S. Environmental Protection Agency.

(2) The Department shall formulate and prepare a tentative determination to issue or deny an NPDES permit for the discharge described in the application. If the tentative determination is to issue an NPDES permit, then a proposed NPDES permit shall be drafted which includes at least the following:

(a) Proposed effluent limitations;

(b) Proposed schedule of compliance, if necessary; established in conformance with the Federal Act and regulations issued pursuant thereto;

(c) Other special conditions.

(3)(a) In order to inform potentially interested persons of the proposed discharge and of the tentative determination to issue an NPDES permit, a public notice announcement shall be prepared and circulated in a manner approved by the Director. In addition to the information required under OAR 340-11-007(1) the public notice shall contain:

(A) A description (when available) of the water quality of the receiving water body both upstream and downstream;

(B) If the waterbody is water quality limited under Section 303(d)(1) of the Clean Water Act, a description of whether the permit relates to the parameter(s) which is water quality limited; if so, how the permit will fit within the existing TMDLs or if no TMDL exists, how it is acceptable; and

(C) A description of any load increase proposed and action required for its approval.

(b) The notice shall encourage comments by interested individuals or agencies, and shall tell of the availability of fact sheets, proposed NPDES permits, applications, and other related documents available for public inspection and copying. The Director shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit written views and comments. All comments submitted during the 30-day comment period shall be considered in the formulation of a final determination.

(4) A fact sheet shall be prepared for each draft NPDES permit for a major industrial facility and each NPDES general permit. In addition, a fact sheet shall be prepared for every industrial NPDES permit which incorporates a variance and for every draft permit which the Director finds is the subject of widespread public interest or raises major issues. Fact sheets shall contain the following, where applicable:

(a) A brief description of the type of facility or activity;

(b) The type and quantity of wastes to be discharged;

(c) Applicable standards and guidelines used as a basis for effluent limits;

(d) An explanation of any proposed variances;

(e) A sketch, map, or detailed location of the discharge, where appropriate;

(f) Information spelling out procedures for finalizing the permit and providing additional public input, including opportunity for public hearing; and

(g) Where appropriate, an assessment of future control needs based on the adequacy of present controls, records of compliance, applicable rules and regulations.

(5) After the public notice has been drafted and the fact sheet and proposed NPDES permit provisions have been prepared by the Department, they will be forwarded to the applicant for review and comment. All comments must be submitted in writing within 14 days after mailing of the proposed materials if such comments are to receive consideration prior to final action on the application, unless the applicant requests additional time. The applicant may also waive his right for the 14-day review time in the interest of accelerating the issuance procedures.

(6) After the 14-day applicant review period has elapsed, the public notice and fact sheet shall be sent to any person upon request. The director shall add the name of any person or group upon request to a mailing list to receive copies of public notices and fact sheets. Any public notice and fact sheet under this section shall be prepared and circulated consistent with the requirements of regulations issued under the Federal Act. The fact sheet, proposed NPDES permit provisions, application,

and other supporting documents will be available for public inspection and copying. The Director may, in his discretion, charge a reasonable fee for reproduction and distribution of the public notice, fact sheet, and other supporting documents.

(7) The Director shall provide an opportunity for the applicant, any affected state, or any interested agency, person, or group of persons to request or petition for a public hearing with respect to NPDES applications. If the Director determines that useful information may be produced thereby, or if there is a significant public interest in holding a hearing, or there are written requests for a hearing from ten persons or from an organization or organizations representing at least ten persons, a public hearing will be held prior to the Director's final determination. Instances of doubt shall be resolved in favor of holding the hearing. There shall be public notice of such a hearing.

(8) At the conclusion of the public involvement period, the Director shall make a final determination as soon as practicable and promptly notify the applicant thereof in writing. Any NPDES permit issued hereunder shall contain such pertinent and particular conditions as may be required to comply with the Federal Act or regulations issued pursuant thereto. If the Director determines that the NPDES permit should be denied, notification shall be in accordance with OAR 340-45-050. If conditions of the NPDES permit issued are different from the proposed provisions forwarded to the applicant for review, the notification shall include the reasons for the changes made. A copy of the NPDES permit issued shall be attached to the notification. In any case, before

the Director will issue an NPDES permit which applies effluent limitations in accordance with effluent guidelines rather than water quality standards, he will make a determination that the permitted discharge will not violate applicable water quality standards and will provide some justification for that determination. Such justification will include, but not necessarily be limited to:

(a) A description of the anticipated effect on water quality at the mixing zone boundary of the chemical and/or physical parameter(s) upon which the size and shape of the mixing zone are based; and

(b) A statement of anticipated effect of the discharge on aquatic life.

(9) If the applicant is dissatisfied with the conditions or limitations of any NPDES permit issued by the Director, he may request a hearing before the Commission or its authorized representative. Such a request for hearing shall be made in writing to the Director within 20 days of the date of mailing of the notification of issuance of the NPDES permit. Any hearing held shall be conducted pursuant to the regulations of the Department.

Supreme Court, U.S.
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No. 95-1732

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Association of Metropolitan Sewerage Agencies ("AMSA") represents wastewater treatment agencies of municipal and county governments and local separate wastewater agencies. AMSA members, of which there are one hundred fifty-seven, plus eleven associate member local governments, are owners and operators of major wastewater treatment facilities. A significant number of AMSA members own combined sanitary and storm sewer overflows ("CSOs") or stormwater facilities. National Pollutant Discharge Elimination System ("NPDES") permits issued under Section 402 of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1342, are required for discharges from wastewater facilities. AMSA members are issued NPDES permits for such discharges. Many AMSA members with CSOs do not have permit effluent limitations for those discharges. Studies to develop limitations and planning for compliance with such limitations is presently proceeding under the Environmental Protection Agency's CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994).

Failure to comply with the applicable NPDES permit can subject wastewater agencies to enforcement under Sections 309 and 505 of the CWA, 33 U.S.C. §§ 1319, 1365, resulting in fines and penalties. Allowing citizen suit enforcement of water quality standards in the absence of permit effluent limitations or limits would significantly affect AMSA member agencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Local governments with publicly owned sewage or wastewater treatment facilities (publicly owned treatment works or "POTWs") are issued permits for the discharge of these facilities to waterbodies under the federal Clean Water Act National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342 (§ 402). NPDES permits, issued by the Environmental Protection Agency ("EPA" or "Agency") or states delegated permit responsibility by EPA, contain numeric effluent limitations for amounts and concentrations of identified constituents. These numeric limits are used to plan and design treatment facilities complying with those permit limitations.

Effluent limits are necessary to implement water quality standards established by states under § 303 of the CWA, 33 U.S.C. § 1313. Attainment of water quality standards requires compliance actions by those sources discharging to a waterbody. POTWs nationwide as well as EPA and the states, have relied on this statutory scheme established by Congress, to comply with the CWA, and thereby avoid enforcement action.

Citizen suit enforcement of water quality standards alone, rather than of permit effluent limits, for CSO discharges: (1) is not authorized by the CWA regulatory scheme for wastewater discharges, and (2) would not provide constitutionally required fair notice to POTWs of what these local agencies must do to assure that treatment works comply with the law.

The decision of the court below would allow citizen suit enforcement of water quality standards alone against local governments with CSOs. The Association of Metropolitan Sewerage Agencies *amicus curiae*, with the consent of the parties, submits this brief to demonstrate the importance of this question of federal law to local governments throughout the United States with POTWs, and to respectfully urge this Court to grant the City of Portland's petition.

ARGUMENT

I. UNDER THE CLEAN WATER ACT, LOCAL GOVERNMENT POTWs RELY ON EFFLUENT LIMITATIONS TO DETERMINE THE ACTIONS NECESSARY TO ATTAIN WATER QUALITY STANDARDS.

The Clean Water Act[1] provides for issuance of effluent limitations in NPDES permits to implement water quality standards. Dischargers have relied on these limitations to conform their compliance actions to the requirements of the law. To allow enforcement of water quality standards in the absence of effluent limitations is a fundamental change which would have serious consequences for POTWs and create unnecessary conflict in the law among the circuits.

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[1] 33 U.S.C. §§ 1251-1376 (§§ 101-517).

The CWA establishes the relationship between water quality standards and wasteload allocations resulting in enforceable permit limitations to implement such standards. CWA section 301(a), establishes the authority for enforcing effluent limitations in making "unlawful" the discharge of pollutants

> [e]xcept as in compliance with this section [301 effluent limits], and sections 302 [water quality-related effluent limits], 306 [national standards of performance], 307 [toxic and pretreatment effluent limits], 318 [aquaculture], 402 [National Pollution Discharge Elimination System], and 404 [permits for dredged or fill material].

33 U.S.C. § 1311(a) (referencing §§ 1312, 1316, 1317, 1328, 1342, and 1344). Section 303 (water quality standards and implementation plans) is not included in this list. 33 U.S.C. § 1311(a) (§ 301(a)).

Section 301(b) of the CWA provides in part,

> In order to carry out the objective of this Act there shall be achieved -- ... (1)(C) not later than July 1, 1977, any more stringent *limitation, including those necessary to meet water quality standards....*

33 U.S.C. § 1311(b)(1)(C) (emphasis added).

"Effluent limitation" is defined under § 502(11) of the CWA as:

> . . . any restriction established by a State or the Administrator on *quantities, rates, and concentrations* of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (emphasis added). In establishing restrictions on "quantities, rates, and concentrations" in NPDES permits for individual discharges, these limitations implement ambient water quality standards. *Id.*

The authority of states, or EPA under certain conditions, to establish water quality standards is provided in Section 303 of the CWA. 33 U.S.C. § 1313. Section 303(d)(1)(C) provides:

> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge

> concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C).

While section 505(a)(1) of the CWA authorizes citizens to bring civil actions against any person:

> . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Act [or] (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

nothing in this section includes enforcement of water quality standards alone. 33 U.S.C. § 1365(a)(1).

EPA regulations at 40 C.F.R. § 122.44 (1995) require NPDES permits to include technology-based effluent limitations, controls, and standards. Section 122.44(d) (1995) also allows for the application of more stringent requirements to meet state narrative criteria for water quality, but that same section references limitations to achieve these goals. 40 C.F.R. § 122.44(d)(1)(i) (1995).

In addition, the EPA's Combined Sewer Overflow Control Policy establishes a:

> . . . consistent national approach for controlling discharges from CSOs to the Nation's waters through the National Pollution Discharge Elimination System (NPDES) permit program.

EPA Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18688, 18688 (April 19, 1994). While the 1994 Policy was not in existence during the events in the instant case, it represents EPA's judgement as to what is necessary to regulate CSOs under NPDES permits. The Policy states the relationship between water quality standards and NPDES permit limits:

> Coordinating the development of the long-term CSO control plan and the review of the WQS and implementation procedures provides greater assurance that the long-term control plan selected and the limits and requirements included in the NPDES permit will be sufficient to meet WQS and to comply with sections 301(b)(1)(C) and 402(a)(2) of the CWA.

EPA CSO Control Policy, 59 Fed. Reg. at 18694. Thus, the statutory and regulatory authorities, on which local government POTWs rely, provide for discharge requirements in the form of effluent limitations in permits.

If the Ninth Circuit's ruling in *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (1995) ("*NWEA II*"), is allowed to stand, the result would have a significant impact on the cities and municipalities within that circuit with CSOs and could be persuasive to other courts. Such result would be costly to limited local resources and would lead to regulatory uncertainty for CSOs under the CWA.

Courts which have considered the question of citizen suit enforcement of state water quality standards apart from numerical effluent limitations in an NPDES permit, have declined separate enforcement of those standards. *See Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842 (9th Cir. 1987); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988), *cert. denied*, ___ U.S. ___, 116 S.Ct. 51 (1995); *New York State v. United States*, 620 F. Supp. 374 (E.D. N.Y. 1985); *Save Our Community v. United States Envtl. Protection Agency*, 971 F.2d 1155 (5th Cir. 1992); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984).

The ruling in *NWEA II* is also in conflict with the Second Circuit Court of Appeals decision in *Atlantic State Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 62 (1994), which held that:

> . . . state regulations, including the provisions of SPDES [State Pollution Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required' by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365.

Id. at 359 (citations omitted). The reasoning encompassed in this line of cases is consistent with the statutory scheme and should be upheld.

In allowing a citizen suit to enforce water quality standards, *NWEA II* also contravenes the CWA's "permit as a shield" provision of 33 U.S.C. § 1342(k) (§ 402(k)), on which local government permitees rely. Permit effluent limitations provide an objective requirement, violations of which can be readily determined. By blurring the distinction between water quality standards (33 U.S.C. § 1313 (§ 303)) and effluent limitations (33 U.S.C. § 1311 (§ 301)), the decision in *NWEA II* would allow federal courts to interpret and enforce water quality standards.

II. CITIZEN SUIT ENFORCEMENT OF WATER QUALITY STANDARDS ALONE VIOLATES CONSTITUTIONAL FAIR NOTICE REQUIREMENTS.

Permits without effluent limitations do not provide a discharger with constitutional fair notice as to the actions necessary to comply with the law. Water quality standards -- which describe ambient water quality uses and criteria for the entire water body -- alone do not provide such notice because they do not inform individual point sources of the quantities, rates, and concentrations of constituents that may be discharged. Without such notice, local POTWs should be held harmless from penalties.

This Court has stated numerous times that before a penalty can be assessed, a person must have notice of the prohibited action(s) which would justify that penalty. The issue is fundamental, involving the requirements of due process. Where "the proceeding

is one in which [a party] may be deprived of property rights . . . notice and hearing must measure up to the standards of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)

> (It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . .);

Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)

> ('. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.')

This Court has also stated that in determining whether a statutory provision is "void for vagueness," a court is ". . . permitted to consider the warning . . . not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied." *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963). In this case, discharge control requires significant facility engineering and construction decisions. Therefore, since water quality standards by their very nature are not limitations on amounts, rates, and concentrations of constituents for individual

discharges, they do not provide fair notice of what is required to control such discharges.

In the absence of constitutional fair notice, a party may not be deprived of property by imposing criminal or civil liability. Although this rule is commonly applied in the criminal context, it is now a generally accepted tenet of regulatory law. *See United States v. Mersky*, 361 U.S. 431, 441 (1960) (analyzing a regulation and statute in a criminal prosecution and holding ". . . businessmen must not be left to guess the meaning of regulations").

The direction of this Court has been followed by the Courts of Appeals in the following cases. *See General Elec. Co. v. United States Envtl. Protection Agency*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)

> (Due process requires that parties receive fair notice before being deprived of property. . . . In the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it -- an agency may not deprive a party of property by imposing civil or criminal liability.);

Radio Athens, Inc. (WATH) v. Federal Communications Comm'n, 401 F.2d 398, 404 (D.C. Cir. 1968) (holding that ". . . full and explicit notice is the heart of administrative fairness"); *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (holding that ". . . a regulation cannot be construed to mean what an

agency intended but did not adequately express"); *McElroy Elecs. Corp. v. Federal Communications Comm'n*, 990 F.2d 1351, 1353 (D.C. Cir. 1993)

> (An agency cannot ignore its primary obligation to state its directives in plain and comprehensive English. When it does not live up to this obligation, we will not bind a party by what the agency intended, but failed to communicate.)

Courts require that upon a "fair reading," the regulated party knows or should know what is expected. *McElroy Elecs. Corp.*, 990 F.2d at 1358. "Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Satellite Broadcasting Co. v. Federal Communications Comm'n*, 824 F.2d 1, 4 (D.C. Cir. 1987). The standard in CWA citizen suits should be the same.

The state regulators in the instant case decided that the issuance of the permit and the decision not to undertake an enforcement action were proper regulatory decisions. As this Court has stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." The *Chevron* Court went on to say,

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing

> interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.

Id. at 865 (internal footnote citations omitted). That is what the state regulators did in the present case in issuing Petitioner's discharge permit.

Several factors combined to assure Petitioner that it was not in violation of the NPDES permit: (1) The state had approved the NPDES permit which included CSOs but no effluent limitations; (2) the state did not seek enforcement of the permit in question; and (3) the prevailing understanding of the law surrounding the CWA has been that permit enforcement actions are based upon violation of effluent limitations.

In the instant case, the NPDES permit itself set no effluent limitations on CSOs which would serve as a basis for planning, designing, and constructing control facilities. Water quality standards alone do not inform a discharger of what is needed to conform their activities to the requirements of the law, such as construction of facilities or other actions. Therefore, it is difficult to conclude that Petitioner had fair notice of what would constitute a violation of the permit so that it could take necessary measures to avoid a penalty.

To uphold the Ninth Circuit's decision in *NWEA II* is to turn current principles involving enforcement of CWA provisions on their heads. As the Fifth Circuit held in *Diamond Roofing Co.*,

> . . .[S]tatutes and regulations which allow monetary penalties against those who violate them . . . must give . . . fair warning of the conduct it prohibits or requires, and *it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.*

528 F.2d at 649 (emphasis added).

If applied nationwide, *NWEA II* would threaten the stability and certainty under the CWA associated with limiting enforcement actions to violations of effluent limitations in NPDES permits. Water quality standards alone do not suffice to provide local governments fair notice of what they must do to conform their conduct to the requirements of the law. Based on the foregoing, the Ninth Circuit's decision in *NWEA II* should be overturned.

CONCLUSION

For the reasons set forth above, *amicus curiae* respectfully requests that the Court grant the City of Portland's petition for writ of *certiorari*.

Respectfully submitted,

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